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CONGRESSIONAL OVERSIGHT OF EXECUTIVE AGREEMENTS

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HEARING

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

ON

S. 3475

A BILL TO HELP PRESERVE THE SEPARATION OF POWERS
AND TO FURTHER THE CONSTITUTIONAL PREROGATIVES OF
CONGRESS BY PROVIDING FOR CONGRESSIONAL REVIEW OF
EXECUTIVE AGREEMENTS

APRIL 24 AND 25; MAY 12, 18, AND 19, 1972

Printed for the use of the Committee on the Judiciary



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S. 3475—TO HELP PRESERVE THE SEPARATION OF POWERS AND TO FURTHER THE CONSTITUTIONAL PREROGATIVES OF CONGRESS BY PROVIDING FOR CONGRESSIONAL REVIEW OF EXECUTIVE AGREEMENTS

MONDAY, APRIL 24, 1972

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 318, Old Senate Office Building, Senator Sam J. Ervin (chairman of the subcommittee) presiding.

Present: Senator Ervin (presiding).

Also present: Rufus L. Edmisten, chief counsel and staff director; Joel Abramson, minority counsel; Walker F. Nolan, assistant counsel, and Prof. Arthur S. Miller, consultant.

Senator ERVIN. The subcommittee will come to order.

The Subcommittee on Separation of Powers today begins hearings on S. 3475, a bill to help preserve the separation of powers and to further the constitutional prerogatives of Congress by providing for congressional review of executive agreements.

The use of executive agreements as a substitute for treaties has spiraled in recent years, giving rise to increasing concern which has been voiced in Senate hearing rooms, on the Senate floor, and in the national press.

Some observers feel that the marked increase in the number of executive agreements vis-a-vis treaties is inevitable in an era when international commerce and communications have shrunk national boundaries and have made it essential that nations be able to enter into technical agreements with a minimum of delay. However, although a majority of the ever-increasing number of executive agreements deal with routine technical matters, it is obvious, to my mind, that in recent years the so-called executive agreement has been used to deal with problems formerly dealt with only by treaty, compelling the conclusion that executive agreements are being used to circumvent the treatymaking provisions of the Constitution. Such a development is contrary to the constitutional principles envisioned by the Founding Fathers as well as a clear violation of the doctrine of separation of powers.

To my mind, a thorough examination of the questions involved is needed to provide a clearer definition of the powers, duties, and pre-

rogatives of the two branches of the Government in this area. At the outset, I should like to emphasize that the subcommittee's examination of the questions involved does not focus on the myriad problems which this conflict has created in the field of foreign relations for those issues are under constant scrutiny by the Senate Foreign Relations Committee. Rather, we shall focus principally on the constitutional issues and the separation of powers problems this conflict presents.

I know there are many persons, both in the academic field and within the Government, who maintain that exclusive Executive control of foreign policy, and domestic policy, insofar as it may be affected by foreign policy, is the price of survival in this nuclear age. They argue that we live in an age of recurring crises and that the need is great for strong central leadership able to make decisions and take action before the opportunity for constructive action is past. I certainly agree that we live in an era that presents critical challenges to any form of government. However, I do not agree that we need to abandon the constitutional principles that have served us so well throughout our history. I firmly believe that we can adhere to those principles without any loss of effectiveness in the field of foreign policy.

Article II, section 2 of the United States Constitution provides that the President "shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." This language makes it clear that the Founding Fathers did not anticipate that policymaking in the area of foreign affairs should be concentrated in one branch of the Government. All governmental powers, including the treaty-making power, were to be subject to a system of checks and balances under the doctrine of separation of powers. To those persons who advocate exclusive Executive control over foreign affairs in the name of dispatch and efficiency, I would commend the reading of the words of Mr. Justice Brandeis in *Myers v. U.S.*, 272 U.S. 240, 293 (1926) :

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autoeracy.

Even Alexander Hamilton, who was a leading advocate of a strong Executive, feared the dangers inherent in placing the conduct of foreign affairs in one branch, and pointed out that it was a shared power. Speaking of the "intermixture of powers" in this field, in *Federalist LXXV*, he said :

*** the particular nature of the power of making treaties indicates a peculiar propriety in that union (the Senate and Executive). Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them . . . The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the op-

eration of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

In discussing article II, section 2 of the Constitution, James Iredell, the distinguished member of the North Carolina Ratifying Convention, and one of the first Justices of the U.S. Supreme Court, made it clear that the conduct of foreign affairs was not vested solely in the Executive. I quote his words:

The power of making treaties is so important that it would have been highly dangerous to invest it in the Executive alone, and would have been a subject of much greater clamor. From the nature of the thing, it could have not been vested in the popular representative. It must, therefore, have been provided for with the Senate's concurrence or the concurrence of a Privy Council, (a thing which I believe nobody has been mad enough to propose), or the power, the greatest monarchical power that can be exercised, must have been vested in a manner that would have excited universal indignation, in the President alone.

This quotation is found in Pamphlets on the Constitution of the United States Published During Its Discussion by the People, 1787-1788 (Brooklyn: Brooklyn Historical Club, 1888), page 342, edited by Paul Leicester.

Clearly, the power to enter into executive agreements is not expressly granted under the Constitution, and the most cursory reading of constitutional history reveals the intention of the Founding Fathers that the President was to be precluded from engaging in the making of any substantive foreign policy without the advice and consent of the Senate. For most of our early history, this restraint was honored, and virtually all of our foreign commitments were entered into by formal treaties. For example, as recently as 1930, the United States concluded 25 treaties and only nine executive agreements. In contrast, in 1968 the United States concluded 16 treaties and 266 executive agreements, and by January 1, 1972, the United States had a total of 947 treaties and 4,359 executive agreements.

During the past few decades, the executive branch has found irresistible the temptation to dispose of what it considered routine matters through the shortcut method of entering into executive agreements, rather than the constitutional method of making formal treaties; nor is it difficult to account for this development. The conclusion of the World Wars, particularly the Second World War, thrust the United States into a position of international leadership and prominence never dreamed of in our earlier history. After World War II, our efforts to render economic aid to Europe to help it rebuild, combined with our cold war efforts to curb the expansion of totalitarian regimes, were expressed in legislatively passed foreign aid programs of unprecedented scope. Many of the executive agreements reflected in the statistics, no doubt, represent minor matters necessary to the execution of our foreign aid commitments. On the other hand, the concept grew, like Topsy, without rhyme or rea-

son, and the absence of clearly understood definitions of the situations where such shortcut methods of making foreign commitments are and are not proper, leave open a discretion in the Executive which runs counter to the letter and spirit of article II, section 2 of the Constitution.

The legal basis for the use of executive agreements is unclear at best, and most frequently has been grounded on the argument of usage—a legal justification that is not entirely satisfactory. As I have often noted in various other contexts, murder and rape have been with us since the dawn of human history, but that fact does not make rape legal or murder meritorious. In effect, reliance on usage in this instance grounds concepts of constitutionality on acquiescence rather than on the written document, and is, to my mind, wholly acceptable. It always has been my view that the Constitution means what it says. Moreover, I am not impressed with the recitation of so-called precedents to support *de facto* constitutional amendments. Even 200 years cannot make constitutional what the Constitution declares is unconstitutional.

Aside from the absence of a legal basis for the practice, there is no accepted definition of what constitutes an executive agreement. The general textbook definition states that undertakings involving the national interest, political issues, changes of national policy, and commitments of a permanent nature usually take the form of treaties, while those involving adjustments of detail, and those which are more or less of a temporary nature often take the form of Executive agreements. In a document entitled circular No. 175, the Department of State, in a masterpiece of circularity, decrees that Executive agreements “shall not be used when the subject matter should be handled by treaty,” but the circular gives no precise standard for when a treaty should be used. The Department of State, in the foreword to its publication “Treaties in Force,” classifies international agreements other than treaties as being those which are made by the Executive (a) pursuant to and in accordance with the existing legislation or treaty; (b) subject to congressional approval or implementation; or (c) under and in accordance with the President’s constitutional power. But what is the constitutional power of the President to make Executive agreements?

The State Department admits that it is unable to devise a standard for when “the subject matter and the treatment thereof are within the constitutional powers of the President.” I again quote from its circular 175:

Difficulty of Precise Definition:

Precise formula not available because it involves definition of:

- (1) entire scope of the President’s authority in the field of foreign affairs.
- (2) entire scope of delegated powers of Congress and its powers under the final paragraph of Article I, Sec. 8, of the Constitution, which provides that Congress shall have power: To make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

A determination of the scope of the President’s authority in the field of foreign affairs, as well as the scope of the powers of the Congress in this field, is the heart of our inquiry. We should not shrink from the task merely because it is difficult.

The courts have not squarely faced the issue. Four cases are often cited in connection with the subject: *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942), and *Reid v. Covert*, 354 U.S. 1 (1957). However, a brief analysis reveals that none of them dealt on point with the thrust of these hearings: to determine the proper role of the executive agreement as an instrument of foreign policy. In *Curtiss-Wright*, Mr. Justice Sutherland, in what must be characterized as dicta, enunciated his view that the power of the Federal Government does not derive solely from affirmative grants in the Constitution but from the powers inherent in its sovereignty, and that even beyond that authority, there is power in the executive branch deriving from "the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations . . ." The doctrine of inherent powers was again enunciated in *United States v. Belmont* and in *United States v. Pink*, but was explicitly rejected by the Supreme Court in *Reid v. Covert*.

However, in rejecting the doctrine of inherent powers which had been expressed in *Curtiss-Wright*, *Belmont*, and *Pink*, the Supreme Court failed to substitute a precise standard for determining the allocation of external powers. Only when individual rights have been threatened by an executive agreement has the Court been willing to intervene.

The doctrine of inherent powers seems to have become the most important rationale utilized by the executive branch in recent years in its effort to usurp legislative power both in the domestic and foreign affairs arenas. It is used by persons who want to justify acts which cannot be justified under the plain written provisions of the Constitution. In the arena of foreign affairs, the Founding Fathers considered carefully the proper allocation of powers and concluded that the President should not be permitted to engage in treaty-making without the advice and consent of the Senate.

I have always considered the division of authority between the President and Congress in foreign affairs to be most accurately characterized by Prof. Edward S. Corwin in his book, "The President: Office and Powers." This work has been widely quoted, often to support the proposition that the President should have the major role in determining the substantive content of foreign policy. Indeed, Professor Corwin does recognize that this has been the case in recent history. It is significant that he concludes that such was not the intent of the basic document. He states:

The principle that the National Government is as to external affairs a completely sovereign government being conceded, it logically follows that Congress' legislative power in the same field is also plenary. Except indeed for its inability to require the President to exercise his concurrent powers in the same field, Congress has approximately as broad powers over such matters as has the British Parliament. And, of course, once Congress has legislated, the President becomes constitutionally obligated to take care that its laws be faithfully executed. . . . Congress has, to repeat, vast powers to determine the bounds within which a President may be left to work out a foreign policy.

I subscribe fully to that view. By far the most significant powers in the field of foreign relations are conferred upon the Congress

alone or upon the President and the Congress jointly. The powers conferred individually upon the President are instrumental only. I find nothing in the basic document and nothing in the debates of the Constitutional Convention to support a broader conception of the President's diplomatic role. In short, what the framers intended was that the President should be the channel of communication between the United States and foreign nations, but, in fulfilling that function, he should be merely the executor of a power of decision that rests elsewhere; that is, in the Congress. This was the balance of power between the President and Congress intended by the Constitution. This is the balance of power that the Congress can enforce if it is only willing to do so.

Our system of government rests on a system of shared powers and responsibilities. In reaffirming the constitutional role of the Congress in the field of foreign affairs, much more is at stake than a formalistic observance of a paper distribution of powers, prerogatives, duties, and functions. The framers of the Constitution did more in devising that document than merely deal out the elements of power among three branches of the Government. Because the Founding Fathers knew that the absence of the consent of the governed would lead to revolt, they sought to strike a balance between tyranny on the one hand, and anarchy on the other. Because this principle was recognized as applicable to foreign policy as well as to domestic policy, they gave Congress, and especially the Senate, important responsibilities in this field. The Senate's ultimate responsibility is to make certain that our Nation's foreign policy remains responsive to the wishes of the people, because in a democratic society, no policy, however enlightened, can long survive without the consent and support of the people.

The importance of the congressional role in formulating foreign policy lies in mobilizing and expressing popular support. Through the Congress, the people have a voice and a way to make it heard. Neither the Department of State, nor the Supreme Court, nor even the President, can perform this great function of giving expression to the people's wishes on an issue.

If foreign policy were the exclusive domain of the Executive, the decisions and the policy of the United States would not be made with the active participation of the people. The people will not forever support a foreign policy which is made for them, but without them.

At this point, I should like to commend the Senate Committee on Foreign Relations for its tireless efforts to restore the legislative branch of the Government to its constitutional role in this area. Senator Case has performed yeoman service in securing Senate passage of S. 596 and S. Res. 214. These measures are indeed a step in the right direction.

During these hearings, the subcommittee will consider carefully the provision of S. 3475, which I introduced on April 11, 1972. The bill is simple in its terms. It recognizes that the Founding Fathers' concept of shared powers in the area of international agreements has been substantially eroded by the use of so-called executive agreements. In plain language, the measure defines executive agreements

and requires that the Secretary of State shall transmit each such agreement to both Houses of Congress. If, in the opinion of the President, the disclosure of any such agreement would be prejudicial to the security of the United States, the bill provides that it shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy. Under this injunction of secrecy, only the members of both Houses of the Congress shall be permitted to inspect the document.

The bill further provides that each executive agreement transmitted to the Congress shall come into force and be made effective after 60 days—or later if the agreement so provides—unless both Houses pass a concurrent resolution expressing disapproval of the executive agreement between the date it is transmitted to the Congress and the end of a 60-day period. In other words, the Congress, in its shared-power role, will have an opportunity to state that it does not approve of an executive agreement during the 60-day period after the agreement is transmitted to the Congress.

It appears to be that the executive branch of the Government would welcome a method whereby the Congress would share the responsibility for making international agreements which affect the international image of our Nation and its people, the allocation of our tax resources, and, in many instances, impinge upon the possibilities of achieving peace in the world.

(S. 3475 follows:)

S. 3475, 92nd Cong., second sess.

A BILL To help preserve the separation of powers and to further the constitutional prerogatives of Congress by providing for congressional review of executive agreements

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Whereas the Constitution of the United States established a system of shared powers between the legislative and executive branches of the United States Government in the making of international agreements; and whereas, the Congress finds that its powers have been substantially eroded by the use of so-called executive agreements, and the Senate is hereby prevented from performing its duties under section 2, article II, of the Constitution, which provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur", and, whereas, the Congress is often prevented from participating in the conduct of foreign relations by way of prior statute on concurrent resolution, therefore be it enacted as follows:

SECTION 1. (a) In furtherance of the provisions of the United States Constitution regarding the sharing of powers in the making of international agreements, any executive agreement made on or after the date of enactment of this Act shall be transmitted to the Secretary of State, who shall then transmit such agreement (bearing an identification number) to the Congress. However, any such agreement the immediate disclosure of which would, in the opinion of the President, be prejudicial to the security of the United States shall instead be transmitted by the Secretary to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate written injunction of secrecy to be removed only upon due notice from the President. Each committee shall personally notify the Members of its House that the Secretary has transmitted such an agreement with an injunction of secrecy, and such agreement shall thereafter be available for inspection only by such members.

(b) Except as otherwise provided under subsection (d) of this section, any such executive agreement shall come into force with respect to the United States at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the executive agreement is transmit-

ted to Congress or such committees, as the case may be, unless, between the date of transmittal and the end of the sixty-day period, both Houses pass a concurrent resolution stating in substance that both Houses do not approve the executive agreement.

(c) For the purpose of subsection (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day period.

(d) Under provisions contained in an executive agreement, the agreement may come into force at a time later than the date on which the agreement comes into force under subsections (b) and (c) of this section.

SEC. 2. For purposes of this Act, the term "executive agreement" means any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States, and which is made by the President or any officer, employee, or representative of the executive branch of the United States Government.

SEC. 3. (a) This section is enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of concurrent resolutions described by subsection (b) of this section; and it supersedes other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) For the purposes of this section, "concurrent resolution" means only a concurrent resolution of either House of Congress, the matter after the resolving clause of which is as follows: "That the Congress does not approve the executive agreement numbered ——— transmitted to (Congress) (the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives) by the President on ———, 19—," the blank spaces therein being appropriately filled, and the appropriate words within one of the parenthetical phrases being used; but does not include a concurrent resolution which specifies more than one executive agreement.

(c) A concurrent resolution with respect to an executive agreement shall be referred to a committee (and all concurrent resolutions with respect to the same executive agreement shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives as the case may be.

(d) (1) If the committee to which a concurrent resolution with respect to an executive agreement has been referred has not reported it at the end of twenty calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the concurrent resolution or to discharge the committee from further consideration of any other concurrent resolution with respect to the executive agreement which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the concurrent resolution, is highly privileged (except that it may not be made after the committee has reported a concurrent resolution with respect to the same executive agreement), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other concurrent resolution with respect to the same executive agreement.

(e) (1) When the committee has reported, or has been discharged from further consideration of, a concurrent resolution with respect to an executive agreement, it is at any time thereafter in order (even though a previous mo-

tion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on the concurrent resolution shall be limited to not more than two hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the concurrent resolution is not in order, and it is not in order to move to reconsider the vote by which the concurrent resolution is agreed to or disagreed to.

(f) (1) Motions to postpone, made with respect to the discharge from committee, or the consideration of a concurrent resolution with respect to an agreement, and motions to proceed to the consideration of other business, shall be decided without debate.

(2) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a concurrent resolution with respect to an executive agreement shall be decided without debate.

Senator ERVIN. The subcommittee is very fortunate in having some very distinguished witnesses who have agreed to aid the committee by their appearance and by expressing their views on this very important subject.

The first of our witnesses is one of America's most distinguished lawyers, a former member of the Supreme Court of the United States and former Ambassador of the United States to the United Nations, the Honorable Arthur J. Goldberg.

We certainly do appreciate, far more than I can say, your willingness to be here and give us the benefit of your study and observations and reflections on this very important matter.

STATEMENT OF HON. ARTHUR J. GOLDBERG, JUSTICE, SUPREME COURT OF THE UNITED STATES, RETIRED, AND FORMER AMBASSADOR TO THE UNITED NATIONS

Mr. GOLDBERG. Thank you very much, Mr. Chairman, and members of the committee.

I am privileged to appear here today at the committee's invitation to give my views on what the chairman has just properly characterized as a most important question of our Government's policy.

I want to commend this committee for addressing itself to this subject which bears importantly on our constitutional commitment to separation of powers.

The problem of executive agreements vis-a-vis the treaty power of the Senate has properly become a matter of increasing concern. And it is most appropriate that this Subcommittee on the Separation of Powers thoroughly examine the questions involved in this vital area of our foreign affairs, because the basic issue really is separation of powers and our constitutional applicability.

Before addressing myself specifically to the fundamental question relating to the treaty power of the Senate and the asserted countervailing claim of executive authority to enter into binding agreements with foreign countries without the consent of Congress, I would like to make a general observation which is relevant, however, to the particular matter which this committee is exploring.

It is an understatement to observe that we are approaching, if we have not already reached, a constitutional crisis in the relations between the Executive and Congress. This is evident from recently approved bills by one or both Houses, to which the chairman has referred in his statement, from hearings in several areas involving Executive-congressional relations and from differing positions asserted respectively by the Executive and by Congress.

For example, the Senate very recently, by an overwhelming vote, approved a bill sponsored by Senators Javits, Stennis, Eagleton, and Spong relating to the war powers of the President.

Just the other day, the Committee on the Judiciary had to take a stand under the leadership of the chairman of this subcommittee regarding an asserted claim by the President of executive privilege for one of his White House aides. In my view, Mr. Chairman, your position was entirely correct and based upon a proper concept of the Constitution's allocation of powers between the Executive and Congress.

It is true—if I may interject—that there are executive privileges, but these are the President's, and these privileges are designed to protect the President in the course of his conduct of his office. They do not relate to the denial to the Congress of its need and right to know from members of the White House staff of matters of public concern that do not infringe upon the confidential communications between the President and the members of his staff. I think it was all to the good that Mr. Flanigan testified. I regret that there were limitations which had to be agreed upon in order to obtain that very limited appearance before the Judiciary Committee.

I recall, Mr. Chairman, as you do, some of Justice Brandeis' most pertinent observations. One of these basic to our democracy is that "sunlight is the most powerful disinfectant." Indeed, it is.

At the instance of Senator Case and others, the Senate has approved S. 596, requiring that international agreements other than treaties hereinafter entered into by the United States be submitted to Congress within 60 days after the execution thereof. This bill reflects the frustration of Congress with respect to the subject of executive agreements.

I regret that the Executive, has asserted that it would only comply in part with this bill. In my view, there is no need or justification for administrations, past and present, to oppose, as they have done and are doing, these efforts by Congress to perform its proper role in our constitutional scheme.

The President, Congress and, importantly, the American people need to be constantly reminded that we are a government of separation of powers and that an essential safeguard of our democracy is the checks and balances which the Founding Fathers provided in the Constitution.

I also regret that the executive branch of the Government seems to regard congressional efforts in this area to be an attack upon presidential powers and prerogatives. These efforts should be welcomed as a return to the true constitutional faith upon which, as Judge Learned Hand once reminded us, we have risked our all.

It is in light of these general observations that I now turn to the specific question of executive agreements.

A good way to start is the fact that executive agreements are not mentioned in the Constitution. This is in sharp contrast with the express language of the Constitution relating to treaties.

The treaty language in the Constitution, article II, section 2, establishes our constitutional structure for dealing with what I would term to be substantive agreements between our country and foreign powers. The language bears repeating. "He"—the President—shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

Mr. Chairman, one does not have to be a jurist, a lawyer or a political scientist to understand the plain meaning and import of these words. The Constitution, by this language, requires the President to submit substantive agreements—whatever the nomenclature that may be attached to these agreements—affecting our relations with other countries to the Senate for approval by the requisite majority.

The treaty provision of the Constitution parallels the constitutional provisions relating to the War Power. Article I, section 8, of the Constitution provides that Congress shall have power to declare war. These explicit words and its legislative history make it crystal clear that the power to sanction the use of the sword is in Congress.

And the Constitution confirms that this is so by further words in article I, section 8, that Congress shall have power—

To raise and support Armies . . . to provide and maintain a Navy . . . to make rules for the Government and regulation of the land and naval forces . . . [and] to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . .

Now, it is true, as the administration asserts, that article II, section 2, provides that—

The President shall be Commander in Chief of the Army and Navy of the United States * * *.

Here, again, however, the meaning and intent are clear and confirmed by the constitutional debates. Only Congress constitutionally can make war. The President, after a proper declaration of war by Congress is entrusted with the function of waging a war declared by Congress. But even this power of the President is subject to the check of congressional control of appropriations.

Now, Mr. Chairman, it is also true that the Constitution, in vesting the Executive Power in the President, empowers him to conduct the Nation's foreign policy. I emphasize "conduct." But, as I have already pointed out, this power is subject to the very important check that the Senate must, under article III, section 2, advise and consent to his making of treaties, and Congress as a whole must pass the laws to raise the revenues required both for military and foreign affairs.

Congress, therefore, has the power of the purse, not only with respect to the sword but with respect to the conduct of diplomacy.

The Administration argues that tradition sustains the Executive's power to enter into executive agreements dealing with substantive as well as routine or administrative matters.

Now, Mr. Chairman, it is true, as you have pointed out, that executive agreements have proliferated, particularly in recent times. But

past practice cannot justify departure from plain constitutional mandates. At most, past practice demonstrates that Congress has been derelict in the performance of its constitutional responsibilities while the Executive has been over-assertive in extending its authority beyond the Constitution.

And I am more than gratified, as the American people should be, that under the leadership of the chairman and this committee Congress is now seeking to repair what in the past has been too much acquiescence in Executive actions asserting powers beyond the Constitution.

Now, Mr. Chairman, you have adverted to one of the arguments that have been made before this Committee and the Foreign Relations Committee about the exigencies of modern times and the necessity in this troubled nuclear age for the Executive taking action to protect our Nation. This is the concept of so-called "inherent powers." It is a weak reed upon which to rely.

You, Mr. Chairman, have cited some cases on this subject, and I would like to mention another one, the great case of *Youngstown* versus *Sawyer*, the steel seizure case in which I, personally, participated when I was at the private bar, before assuming public office.

In that case, Justice Black rejected, for the Court, the concept of inherent powers which would operate to extend Presidential authority beyond the Constitution. Long before that case, the Supreme Court, in *Ex parte Milligan*, a post-Civil War case, declared that applicable:

The Constitution of the United States is a law for rulers and people, equally in war and in peace.

Now, if in the time of actual wartime the Constitution cannot be displaced, it cannot be displaced during a period of cold wars and during a period of international tension.

When I was on the Supreme Court, I said that the Constitution was not a suicide pact. It is not a suicide pact, but any concept that Congress would be delinquent in protecting our Nation's conduct of foreign affairs seems to be one which does not do justice or credit to the responsibility and the character of the men and women whom the people have elected to represent them in Congress.

Now, this is not to say that the President does not possess some implied powers as Chief Executive to enter into binding agreements with foreign powers on his sole authority. But this power under the Constitution is necessarily confined to matters of a routine or administrative nature or matters expressly authorized by a treaty approved by the Senate or by other appropriate legislation.

In matters of weight and substance, such as stationing of troops in a foreign country or entering into or renewing agreements with foreign powers for military bases, fidelity to the Constitution requires the Executive to seek the advice and consent of the Senate to such agreements. However such agreements may be termed, they are treaties in a constitutional sense.

The recently concluded so-called executive agreements between the United States and Portugal and the United States and Bahrain involve weighty and important matters embracing deployment of our armed forces and substantial foreign assistance. I agree with

Senator Case and other members of this committee that adherence to and respect for the Constitution requires that these agreements be submitted to the Senate for its advice and consent.

I find the argument of the administration, that the Portugal and Bahrain agreements represent merely a continuance of old agreements and practices rather than the making of new commitments, to be completely disingenuous.

The plain fact of the matter is that both agreements involve important foreign policy decisions in a changed world. Furthermore, both agreements contain new elements—political and financial—not part of the old arrangements.

Both agreements warrant considered scrutiny by Congress and submission as treaties in a constitutional sense.

Now, what is the remedy for the constitutional violations which, in my view, have been occurring and have been intensifying?

I first deal with the one proposed by Senator Case, namely, the blocking of the financial assistance to Portugal and Bahrain promised in the recent so-called executive agreements, with such payments to remain suspended until the Executive submits to the Senate as treaties these agreements. This may seem to some extreme. I do not agree that this is so. What other recourse does the Senate have to put an end to continuing disregard of the Constitution by the Executive in this important area? Congress has tried other and less drastic means without success. Congress has the power of the purse, and what better way to employ it than in the interests of constitutional government?

Can anyone who is a lawyer worthy of the name or, indeed, any informed layman, deny that in the Portugal and Bahrain agreements we have made a national commitment of import. It is not the sense of the National Commitment Resolution approved by Congress that Congress shall perform its necessary constitutional duty before our Nation is committed to others, in important matters.

Mr. Chairman, your bill, S. 3475, which you introduced on April 11, 1972, is a moderate bill, but comprehensive. It is comprehensive in that it encompasses not only the particular treaties that are involved with respect to Portugal and Bahrain but the whole question of executive agreements. Your bill is well fashioned. It takes into consideration the arguments that the administration has been making about submitting executive agreements to Congress.

Since people are entitled to be informed, too, though some have elements of secrecy and classification, here, too, I do not find a good reason why it should be a thing that the Congress of the United States is not equally concerned with protecting the essential and very limited secrecy aspects of any agreement.

Beyond that, you have followed in drafting your bill a technique adopted in other congressional legislation, like the reorganization acts, by providing that an executive agreement made by the President shall be effective unless Congress expressly disapproves within a 60-day period. I would hope your bill would be adopted, and I would hope the administration would support it instead of opposing it. I do not find in your proposal any desire or inclination to interfere with the constitutional prerogatives of the President. He has a right to negotiate for our Government a proposed treaty. Obviously,

such negotiation must be vested in the Executive. We learned that lesson from the Continental Congress which tried, itself, with limited success to conduct international negotiations. It is to be remembered, however, that we did not really have an Executive at that time.

Your bill does not propose to assume the prerogatives that are vested in article II in the President. It merely proposes to reassert the constitutional scheme of having substantive agreements of our foreign policy referred to Congress for its advice and consent as the Constitution requires.

I think much more is involved than what appears on the surface. What is really involved is the preservation of our democratic system. This really depends upon the restoration to Congress of powers which, with all respect, it has abandoned too long with untold disastrous consequences to our Nation. I commend your bill, and endorse it without any reservations.

Finally, Mr. Chairman, let me say this:

I believe the war powers bill recently approved by the Senate is a reaffirmation of congressional responsibility under the Constitution. Really, it should not have been necessary if we had been faithful to the constitutional provision which says "Congress shall declare war." And, there, too, the asserted instances of past practices are rather flimsy. It is one thing to chase a pirate and another thing to commit hundreds of thousands of American soldiers to combat.

But be that as it may, whatever the past practices may have been, unconstitutional past practices cannot render constitutional, unconstitutional actions.

We come to the case of executive privilege, and, here, too, it seems to me the Executive is stretching the Constitution beyond permissible limits.

And, finally, we must simply put an end to a situation where, as you have pointed out, thousands of agreements are made, many of large moment, representing commitments of our country, and Congress, representing the people, has not participated in approving such commitments, as is required by the Constitution.

I regret that this has reached the stage of a constitutional crisis. There is a tendency on the part of the Executive and sometimes of Congress and the American people when you have a constitutional crisis to say: So what? The courts will resolve it. This overlooks an important factor. There are some things the courts ought not to be called upon to resolve. There are matters which should be resolved by Congress and the Executive without reference to courts. I fear that we are imposing too much of a burden on the courts to determine issues such as those involving the war power or even the inherent powers of the Executive. The courts are not the only ones sworn to defend the Constitution. The President is. Every member of the executive branch and every member of the Congress is. The Constitution is their charge equally as it is the charge of the judicial branch of the Government.

Thank you very much.

Senator ERVIN. I want to thank you for a most lucid statement, and I am glad you referred to the case of *Ex parte Milligan*. It has

always seemed to me that if any one opinion of the Supreme Court could be picked out as the most courageous, the most intelligent opinion ever handed down, it was the *Ex parte Milligan*.

Mr. GOLDBERG. I agree with that, Mr. Chairman. It is the classic statement of our constitutional commitment and faith.

Senator ERVIN. I think it is a good point to start on any constitutional question, because of the part you have cited in your statement, that the Constitution is a law for the rulers and people alike, equal in war and in peace. I also like another expression Judge Davis used, that no doctrine more pernicious was ever invented by the wit of man than the notion that any of the provisions of the Constitution can be suspended under any circumstances.

Now, do you not believe it is fair to say that one of the reasons why the Constitution was written was to prevent any department of Government from claiming that it had any inherent powers that were not either expressly or impliedly set forth in the Constitution?

Mr. GOLDBERG. That is correct, Mr. Chairman.

That is what our Constitution is, a Constitution which delegates powers and limits them.

Senator ERVIN. And that was the main reason which prompted the Constitutional convention to write it, and the people to ratify the Constitution, it seems to me.

Mr. GOLDBERG. That is correct. Indeed the people had to be assured by the enactment of the Bill of Rights that restraints upon Government were expressly articulated. The Constitution would never have been ratified if approval of the Bill of Rights had not been assured.

Senator ERVIN. Now, as I construe your statement and your remarks you, I think, simplify this matter very much. You point out the fact that we have treaties mentioned in the Constitution, and the method by which they are to be made is set forth, and that executive agreements are not mentioned at all anywhere in that great instrument. It is our position, as you stated very well, that the President is the communicator between our country and foreign nations in foreign affairs. It is your opinion, which you express so clearly, that it lies within the domain of the President, as the executive officer, to actually negotiate a proposed treaty. Then after it has been negotiated by the President, it is entirely within the power of the Senate to either accept or to reject it, depending on whether two-thirds present so vote.

Mr. GOLDBERG. That is correct, Mr. Chairman. And people overlook—and the administration, I think, overlooks—an important fact, that even in the conduct of the foreign policy, as the communicating or negotiating role, there is a check, even at the first instance, conceived by the Founding Fathers: The President may appoint ambassadors but only with the advice and consent of the Senate. If we will look back to communications and negotiations in those days when we did not have airplanes and the ability to get around, ambassadors did the negotiating; John Jay with Great Britain and Benjamin Franklin with France. Therefore, the President, in appointing ambassadors who had great powers had to submit their names to the Senate for confirmation. That, in itself, illustrates the

limitations on even the communications role of the Executive. In other words, the Senate was to participate in the selection of the men who were to carry on negotiations.

Senator ERVIN. Now, I infer your position—I do not need to infer, because you stated it so clearly—that the Constitution clearly contemplates that all agreements of substance between this Nation and any other nation shall be reduced to the form of a treaty, negotiated for the President and then submitted to the Senate for ratification or rejection?

Mr. GOLDBERG. That is correct, Mr. Chairman.

If we negotiated an agreement relating to migratory birds as a treaty requiring ratification by the Senate, then it seems to me that any treaty or agreement relating to deployment of forces which may lead into involvements of a military character certainly requires that procedure.

Senator ERVIN. And is it not extremely important that this procedure be followed in respect to agreements of substance between the United States and foreign countries because of the provision of our Constitution that treaties shall be a part of the supreme law of the land?

Mr. GOLDBERG. Yes, the supremacy clause of the Constitution exalts them to a status equivalent to an act of Congress.

Senator ERVIN. Now, as I construe your views, what we call executive agreements can be properly used by the President in at least two situations: (1) To implement a treaty which has been ratified by the Senate, and (2) to carry out any acts of Congress which have been passed by both Houses which deal with aspects of foreign policy?

Mr. GOLDBERG. That is correct. That would be a proper way to enter into an executive agreement, because the Senate has approved the treaty, and, obviously, when a treaty is made it must be implemented, and the President is the one to implement a treaty.

Even there, I put one qualification: The Senate—very wisely in almost all of our treaties has said that commitment of forces shall be subject to our constitutional processes, which means that the President will then have to report to Congress before waging war. His implementation power under that language does not mean that he unilaterally can declare war.

Senator ERVIN. I recall that it was expressly stated in the SEATO Treaty that we assume no obligation under that treaty unless it was assumed by compliance with our constitutional process.

Mr. GOLDBERG. I have examined almost every treaty we have made of this character, because of my interest in the subject, and my responsibility when I negotiated treaties as Ambassador, and I found it is almost uniform in the congressional approval of treaties to insert such a clause, and appropriately so because of the declaration of war principle which requires Congress to act in their vital area.

Senator ERVIN. Is there any doubt in our mind that the principle that the President exceeds his constitutional powers when he undertakes to make agreements of substance with foreign nations by the executive agreement process rather than by a treaty?

Mr. GOLDBERG. There is no doubt in my mind that that would be a unconstitutional action.

Senator ERVIN. There is no doubt of the fact that Congress needs to know what is in executive agreements in order that Congress may function properly where it is called on, for example, to finance commitments made by the President, or which the President undertakes to make in this form, and it is also imperative, is it not, that the Congress, which has a share of power in this field, not only know what is being done by the executive agreement but has the right to participate in, at least approving or rejecting, an executive agreement?

Mr. GOLDBERG. I agree with you, Mr. Chairman. The people certainly have a right to know and Congress needs to know to do its necessary work in connection with the discharging of its constitutional responsibilities.

Senator ERVIN. Now, do you agree with me that it is entirely reasonable to anticipate that a bill, such as the one I have proposed, would not put any undue burden on the executive as long as the executive can confine itself to the field of merely implementing existing treaties by executive agreement or by implementing action of Congress by executive agreement?

Mr. GOLDBERG. I can see no practical difficulty at all.

I think the difficulties are conjured up largely out of a sense of, I suppose it must be, lack of faith in Congress. And I think that lack of faith is unjustified by the history of congressional performance and congressional responsibility.

Senator ERVIN. I like your quotation from Justice Brandeis about the effect of sunlight as a disinfectant.

Mr. GOLDBERG. The most powerful of all, because it enables the press to know and the people to know; and it brings to bear the accumulated wisdom of a collegiate body upon our most important commitments.

One of the problems I see and a problem not peculiar to the present administration—is that we are becoming far too much a one-man Government. That is not our constitutional scheme.

Senator ERVIN. You notice that in my statement I quoted Justice Brandeis that the Constitution was not written to make an efficient Government.

Mr. GOLDBERG. No; and it was not written to make it convenient for any branch of the Government; it was designed to protect the people.

Senator ERVIN. Now, do you not believe that Congress, in the enactment of a bill of the nature of this bill, would tend to preserve the separation of powers by reminding the President that he should stay within the constitutional sphere allotted to him?

Mr. GOLDBERG. I do, Mr. Chairman.

Senator ERVIN. I think Professor Arthur Miller has some questions he would like to ask.

Professor MILLER. Thank you, Senator.

Just a couple of questions, Mr. Goldberg.

I would like to have it settled in the committee's mind, if we might, as to your views, as a lawyer and as a former Justice of the Supreme Court, as to the power of Congress to enact such a statute.

Is there any doubt in your mind about the constitutional power of the Congress to enact a statute such as this one?

Mr. GOLDBERG. Not at all, under the necessary and proper clause of the Constitution. Congress has the clear right to press the statute.

Professor MILLER. So, the only questions, then, so far as you are concerned, would be whether or not it interferes with the Executive—which would be a policy question—or whether in fact the power exists and to what extent it does? That is entirely clear?

Mr. GOLDBERG. The power exists. Whether the power should be exercised, as you say, Professor, is a question of policy.

Professor MILLER. Let me ask you a couple of specific questions, sir. The Azores agreement with Portugal, as I understand, is defended by the administration as merely an additional agreement under a former executive agreement which is ultimately based on a NATO agreement. Would this fall within your concept of a routine administrative agreement or a substantial agreement?

Mr. GOLDBERG. This is a very substantial agreement, and has always been regarded so, even by the Executive. In the Azores agreement, we are making an agreement to have essentially a military base in a foreign country for the use of our armed forces. Now, in addition to that, the present agreement goes beyond the prior agreements that had been negotiated. It involves a very substantial foreign aid commitment of several hundred millions of dollars. It seems very ironical to me that on the one hand it is defined as an executive agreement which does not require the consent of Congress while on the other hand it cannot be executed at all unless the Congress authorizes and appropriates the money. This indicates to me how clearly it involves the treaty-making provisions.

Professor MILLER. But it occurs to me, Mr. Goldberg, that the appropriation power is a very slim power indeed once a commitment is undertaken. It is more ostensible than real, and to say the Congress has this check is merely to note a facade—

Mr. GOLDBERG. Professor Miller, that is why it is good to have a bill dealing with the subject. I agree with you that once the President has committed the country, Congress is faced with a fait accompli, and it is very difficult at that point not to support the President. It is much better for the other party to know that when the President negotiates, the agreement is subject to approval by Congress.

Professor MILLER. All right. Just two other brief questions, sir. As I understand your statement, you see no undue interference with executive prerogatives or executive methods of conducting foreign relations.

Mr. GOLDBERG. Not at all.

Professor MILLER. And the one question is this: The definition of executive agreement in the bill that the Senator introduced, S. 3475, includes the term "any bilateral or multilateral international agreement or commitment other than a treaty binding on the United States."

Now, we have heard a lot in recent years about commitments and the need for fulfilling them, particularly in Southeast Asia. Would this type of statute cover that type of commitment which abounds, in your judgment?

Mr. GOLDBERG. I think the language you have added would indicate that any commitment of the United States, such as has been re-

ferred to, in Southeast Asia, ought to be submitted to Congress for a treaty form so that the American people will know what it is that we are committed to.

The fact of the matter is, Professor, that the so-called commitments made by the Executive in times of stress do not stand up anyhow unless they have been constitutionally approved.

I recall when I was at the U.N. and we had the Middle East crisis, there was loose talk about commitments. The fact of the matter is that nothing happened with respect to these commitments. It would have been much better for everybody concerned if the so-called commitments had been put in a treaty form, submitted to and approved by Congress, and then we would have had a commitment that we would have honored as a nation that keeps its treaty obligations.

Professor MILLER. One more brief question, Senator.

When you talk about executive agreements, of course, most of those in your judgment—or at least in your experience, sir—are negotiated not by the President or the Secretary of State but by relatively minor executive officials.

Could you give us any estimate as to how many of these the Secretary of State or the President actually get?

Mr. GOLDBERG. Very few by the President himself. I would suppose that the President and the Secretary of State get involved in what we might term the major ones like the Portugal-Bahrain agreement which, in itself, indicates that they ought to be called treaties. The others are handled by subordinate officials of the State, Treasury, Commerce, or other departments of the government. And all the more reason, therefore, that they be submitted to Congress.

Professor MILLER. And there is no place in the executive department where these are screened and looked through as a central clearing office, to your knowledge?

Mr. GOLDBERG. I cannot answer that as of now, but, in my own experience, when I was the Secretary of Labor for example, there was no central clearing office for executive agreements.

Professor MILLER. Thank you, sir. No further questions.

Mr. EDMISTEN. Mr. Goldberg, I just talked to a gentleman in the Defense Department the other day, and he, in very glorious language, assured me that if this bill were to pass it would take transfer trucks to carry the executive agreements over here. Is that just a smokescreen?

Mr. GOLDBERG. If it takes transfer trucks to carry all of the agreements that have been made involving commitments and deployment of forces, and so on, then, the time is long overdue for them to be carried over here, whether it is one truckload or two or three. But I think that is an exaggeration. We are not talking about routine orders; we are talking about something substantial. And I cannot believe that there are truckloads of substantive agreements. If there are, we are in much worse shape than I thought, in terms of honoring the Constitution.

Mr. EDMISTEN. I would like to point out that in the State Department's publication, "Treaties in Force," under the caption of Bahrain, there is one international agreement, the one that is under controversy. So, I do not think the truckload comes into play there.

Also, Mr. Goldberg, in the foreword to this document, it lists the three situations under which the executive branch of the government has power to make executive agreements: (a) pursuant to and in accordance with existing legislation or treaties; (b) subject to congressional approval or implementation; and (c) under and in accordance with the President's constitutional power.

Now, could not part (c) be just a catchall?

MR. GOLDBERG. That is right. Once you say (c), then, you have no constitutional guideline as to what an executive agreement is.

PROFESSOR MILLER. May I interject?

MR. EDMISTEN. Yes.

PROFESSOR MILLER. I take it you are suggesting by citing the *Steel Seizure* case that the President's inherent powers are almost nonexistent?

MR. GOLDBERG. Yes. He has implied powers derived from language of the Constitution, but the concept of inherent powers for the President or for the Congress or for the judiciary is entirely at variance with our constitutional scheme. We are a country with a written Constitution. As I said, Learned Hand said that we staked our all on it, and that document is a document which defines and limits powers.

MR. EDMISTEN. Thank you, Mr. Chairman.

Justice Goldberg, just one question.

When Professor Miller read the pertinent section in this bill, S. 3475, he referred to the definition which includes any bilateral or multilateral agreements which implies that it is not just a substantial agreement; it is any routine agreement. So, in essence, you can have a truckload of routine agreements coming over from the Defense Department.

In your role as Ambassador to the U.N., in which you probably had to consummate routine agreements as well as substantive agreements in a very practical sense, would you find this bill a restraint on your efforts in the United Nations?

MR. GOLDBERG. Not at all, because, as I said, Senator Ervin's bill is a very moderate bill. All it requires is that it be sent over, routine or substantive, and then unless it is disapproved it remains in effect. So, whether it applies to substantive or administrative matters, the bill would place them in the public domain where they ought to be with appropriate safeguards of secrecy and security provisions.

SENATOR ERVIN. Your position is that a substantial agreement has no place in an executive agreement?

MR. GOLDBERG. No, such an agreement is a treaty; really, in a constitutional sense.

There are two aspects to this problem. If an agreement is a treaty, there is no constitutional right to place it in effect without the advice and consent of the Senate. On what might be properly called executive agreements, I think Congress ought to be advised and its approval sought.

SENATOR ERVIN. Well, the committee is certainly indebted to you for a most eloquent and lucid statement.

MR. GOLDBERG. Thank you, Mr. Chairman.

BIOGRAPHICAL INFORMATION—ARTHUR J. GOLDBERG

Arthur J. Goldberg has served as Associate Justice of the Supreme Court of the United States, the Permanent Representative of the United States to the United Nations with the rank of Ambassador, and Secretary of Labor.

Justice Goldberg was born in Chicago, Illinois, on August 8, 1908, the son of Joseph and Rebecca Goldberg.

He received his elementary education in Chicago Public Schools and was graduated from Benjamin Harrison High School in 1924. Mr. Goldberg attended Crane Junior College, a branch of the City College of Chicago. He received the Bachelor of Science in Law degree in 1929 and Doctor of Jurisprudence in 1930 from Northwestern University. He was Editor in Chief of the Illinois Law Review.

In 1929, Mr. Goldberg was admitted to practice before the Illinois bar. He qualified for practice before the Supreme Court of the United States in 1937.

He was engaged in private practice in Chicago from 1929 until 1948 and was the senior partner of the firm of Goldberg, Devoe, Shador and Mikva, Chicago, 1945 to 1961. Mr. Goldberg also practiced law with Goldberg, Feller and Bredhoff, Washington, D.C., 1952-1961, as the senior partner of that firm.

Mr. Goldberg was General Counsel of the Congress of Industrial Organizations, (CIO) 1948-1955, and United Steel Workers of America, 1948-1961. He was Special Counsel for the AFL-CIO, 1955-1961. He also was Legal Advisor to several international unions.

During World War II he served as Special Assistant with the rank of Captain and Major with the Office of Strategic Services.

He is author of articles in American legal publications and journals of opinion, and the author of several books, including "AFL-CIO: Labor United," "The Defense of Freedom: The Public Papers of Arthur J. Goldberg," and "Equal Justice: The Warren Era of the Supreme Court."

Mr. Goldberg married Dorothy Kurgans, an artist, in 1931. They have two children, a daughter, Mrs. Barbara Cramer, a social worker in Chicago, and a son, Robert M. Goldberg, an Alaska lawyer.

Justice Goldberg is practicing law in Washington, D.C., and is also a University Professor of Law and Diplomacy at American University, Washington, D.C.

Senator ERVIN. And the next witness is a distinguished lawyer and also a distinguished public servant, the Honorable Clark Clifford.

I wish to welcome you to the committee and express our deep appreciation for your willingness to come and give us the benefit of your study, observations and views on this very important question.

**STATEMENT OF HON. CLARK M. CLIFFORD,
FORMER SECRETARY OF DEFENSE**

Mr. CLIFFORD. Thank you, Mr. Chairman. I would like to commend your staff for the scheduling of witnesses, because I think that between the testimony of my old and good friend, Justice Goldberg, and mine, you will find substantial differences, which would, I think, be of interest to this committee.

Also, I do not find the matter as simple as Justice Goldberg does. I find it considerably more complex than he.

Also it seems to me that we must consider whether or not this legislation might possibly go too far, and, as I understand it, that is one of the reasons that you, as chairman, are having these hearings.

I have a prepared statement which is not lengthy. It has footnotes in it, and in order to move more expeditiously I will not read the footnotes. Those can be studied at some later time by persons who find the statement interesting enough to do so.

Senator ERVIN. Well, your entire statement will be printed in the record, including those footnotes.

(The prepared statement submitted by Mr. Clifford reads in full as follows:)

STATEMENT OF CLARK M. CLIFFORD ON THE SUBJECT OF EXECUTIVE AGREEMENTS
VERSUS THE TREATYMAKING POWER

I.

Thank you, Mr. Chairman, for your invitation to appear here today to discuss the scope of the treaty-making and executive agreement authorities. I appreciate this opportunity to give you my views on this question, which, I believe, is so important in our system of the separation of powers.

This is a subject that has concerned the Congress, from time to time, through the years. I can recall at least two major inquiries and it is interesting to recall the positions taken on the issues in those cases.

The first instance was at the close of World War II, when United States membership in the United Nations was under consideration. Because of President Wilson's inability to secure two-thirds of the Senate in favor of a treaty calling for our membership in the League of Nations, many feared a similar setback on the U.N. Some suggested that our participation in the United Nations be based on an executive agreement implemented through ordinary legislation; in this manner, the requirement of a two-thirds vote in the Senate could be avoided. The question debated at that time was whether such an executive agreement would be legally equivalent to a treaty. As we all know, the issue was not put to the test, since the United States used the treaty process to adhere to the U.N. Charter and the other international agreements of the period. In each case, however, implementing legislation was also secured.

The next major examination of the President's power to make treaties and executive agreements came in 1953, when the so-called Bricker Amendment was first introduced. Spurred largely by the controversy over the Yalta and Potsdam Agreements, Senator Bricker and his supporters sought to curb the treaty-making power by a constitutional amendment requiring implementing legislation for every treaty and executive agreement. Despite strong opposition from President Eisenhower and Secretary Dulles, the Bricker Amendment failed by only one vote to secure the needed two-thirds majority.

Our inquiry today is also motivated by immediate concerns over particular policies. This time, it is primarily our involvement in the Vietnam conflict that has led to questions regarding the President's power to make international agreements and commitments. While a person's views on Vietnam are bound to color his approach to this issue, I think the questions we are concerned about go further than any particular policy.

I should begin by stressing my own belief in a strong presidency. I need not review all the reasons why, in today's world, our Chief Executive must be able to provide strong leadership both domestically and internationally. Any undue restrictions would gravely impair the President's ability to carry out the responsibilities we now expect him to bear.

But, despite this belief, I am troubled about the recent trend toward unilateral exercise of presidential powers in the international area. As a consequence, our foreign policy has all too often been based upon the proposition that the United States should act as the world's policeman. Shortly after the Cold War began in earnest, we sought to build a strong alliance against communistic aggression. As the years passed, we enlisted as many nations as possible in this cause. Our efforts to this end were assisted by grants of economic and military aid, but they included a great many formal and informal commitments to the defense of those other nations. While resistance to the threat of Soviet aggression in Europe and elsewhere was necessary, I am afraid we became preoccupied with our effort to forge alliances and let it go far beyond our realistic needs. The result has been, I think, to overstretch our capabilities and to make commitments creating exaggerated expectations in others. This expansive view of our world role led directly to Vietnam.

II.

The specific question you have asked me to discuss is the relationship between the treaty and the executive agreement as a means of implementing our

foreign relations. This question, Mr. Chairman, involves legal aspects central to the bill (S. 3475) you recently introduced. It is a question that also raises many important policy considerations. I want to discuss both of these matters, but first let me offer my views, as a lawyer, on the strictly legal aspects.

We all know from the Constitution that the President may negotiate treaties and may ratify them on behalf of the United States after the Senate, by two-thirds vote, has given its consent. Once a treaty comes into force, it is the supreme law of the land, with the same status as a statutory enactment. As such, the treaty is superior to any contrary State laws and preexisting federal legislation.

There is authority for the proposition that the treaty power is broader than the power given to the Congress in Article I of the Constitution.¹ Under that interpretation, a treaty may be made concerning any matter appropriate to our foreign relations, whether or not that matter has specifically been entrusted to the Congress under Article I of the Constitution. But, it is clear that a treaty may not be inconsistent with any specific provision of the Constitution.²

The legal parameters of the executive agreement power have developed more slowly, but today the process appears complete. Such an agreement in my opinion is indistinguishable from a treaty from the international point of view. That is, it matters not to the other country or countries involved how we have made our agreement; their main interest is in having an obligation of the United States.

From the domestic point of view, however, an executive agreement can raise basic constitutional issues regarding the scope of the powers of Congress and the President. In making such an agreement, the President can act on the basis of his own constitutional authority, in reliance on a delegation of power from the Congress, or on a combination of the two.³ The classic example of an agreement relying wholly on the President's constitutional authority is one relating for instance to diplomatic recognition. A tariff agreement may be said to rely almost exclusively on congressional delegations of power. And many of our mutual assistance agreements partake of both authorities.

The cases establish that an executive agreement is the supreme law of the land in the sense of superseding contrary state law.⁴ It is also clear that congressional delegations of power to the President in the international field may be a good deal broader and less precise than would constitutionally be permitted in delegations involving domestic affairs.⁵ In sum, while there is some contrary authority,⁶ I think that the law supports the use of the executive agreement in any case in which the United States is not required to take any action or where such action as we agree to take is already authorized by the Constitution or our laws.

Is there any difference then between a treaty and an executive agreement? My answer is that, in *legal* force and effect, a properly concluded executive agreement, supported, where necessary, with implementing legislation, is tantamount to a treaty.

I note, with interest, in examining the witness list for these hearings, that there will appear before this Committee some of the leading legal scholars and authorities in the country. I am sure they will discuss in detail the technical ramifications of these questions so that you will be fully informed in this regard. My acquaintanceship with the problem has been a practical one as the result of serving in the executive branch of our government and attempting to adjust to the proper roles to be exercised, in this area, by the President and the Congress.

¹ *Missouri v. Holland*, 252 U.S. 416 (1920).

² *Reid v. Covert*, 354 U.S. 1 (1957).

³ I have not stressed the distinction between the *negotiation* of an agreement and its *implementation*. It can be argued that the President is free to negotiate about anything and that he only depends on Congress for authority to implement his agreements. This analysis, while perhaps sound on strictly logical grounds, strikes me as somewhat artificial, since a responsible President must be concerned that agreements he makes will actually be carried out. The analysis also can lend unwarranted support to the practice of making quasicommitments, which call for no specific act by the United States in the case of attack and, therefore, require no implementing legislation until something is to be done. See Part III.

⁴ *U.S. v. Belmont*, 301 U.S. 324 (1937); *U.S. v. Pink*, 315 U.S. 203 (1943); *Baldwin-Lima-Hamilton v. Superior Court*, 25 Cal. Rep. 798 (Ct. of App. 1st Dist 1962).

⁵ *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁶ *U.S. v. Guy Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953).

III

Having now unburdened myself of my opinion that there is no important legal distinction between a treaty and an executive agreement, let me turn to some practical differences I see between the two and some problems those differences can create.

The first difficulty results from the fact that an executive agreement can be concluded and come into force in secret and without Congressional participation. If the President is exercising his constitutional powers, or if he has received advance congressional authorization, he can conclude and implement the agreement without any public announcement. I do not argue that no agreements should be secret. But I do believe that the ready availability of a means for reaching international understandings that can be made and carried out in secret has, by itself, generated unnecessary secrecy.

Examples of this tendency are all too common. We have a long list of secret agreements regarding the supply of military hardware and technical assistance. The use of foreign bases and even the employment in combat of our armed forces have been the subject of secret understandings. But secrecy pervades far more than the military agreement; it is now not uncommon to have a "confidential" side letter accompanying routine economic agreements. Often, the business interests concerned are let in on the secret, but the public—even the Congress—are not.

If we have learned nothing else from Vietnam, it must be clear to all that making foreign policy amidst secrecy is fraught with danger. The executive agreement is only a tool, and, as such, it cannot be blamed for the uses to which it is put. But I cannot help believing that had the executive agreement been used with greater discipline, our foreign policy would not now rely so much on keeping information from our people. I am happy that Congress is now thinking of imposing that discipline.

The second problem I have with the use of executive agreements is limited to the so-called national commitment area, that is, where the United States commits itself to take action to assist other countries in defense against armed attack.

At the outset, I should note that our defense commitments have not obligated us automatically to come to the aid of any other country. Even when embodied in treaties, our understandings have been couched in conditional terms.⁷ Nonetheless, these conditional agreements have formed the keystone of the system of mutual defense arrangements we have built since World War II. Not surprisingly, a central element of our foreign policy has been to convince friend and foe that what are conditional commitments will in fact determine our response to aggression.

I make this point because it shows that mutual defense treaty commitments tend to take on a life of their own, that their conditional nature becomes subjugated to the need to preserve the "word" of the United States. This same metamorphosis can apply to conditional commitments embodied in executive agreements never submitted to the Senate or the Congress as a whole. Yet, the justification for making these agreements without involving the Congress is that they do not obligate the United States to act; they are "only" conditional commitments. Thus, since we agree only that we will take such action as we "may consider appropriate" in the event of a threat to Spain,⁸ no congressional involvement is sought.

I find it difficult to accept this reasoning. We have told Spain that its security and integrity "are necessary for the common security"⁹ of our two countries. Is this very much different from the statement in the North Atlantic Treaty that an attack on one signatory "shall be considered an attack against them all"? Each, I submit, creates the same kind of expectation in the mind of the other signatories. Each is intended to have a deterrent effect upon a possible aggressor. Yet one statement has been made without any specific authorization from Congress.

⁷ For example, the North Atlantic Treaty binds a signatory only to take "such action as it deems necessary" in the event of armed attack against another signatory. (Article 5).

⁸ T.I.A.S. 5437, September 26, 1963.

⁹ *Ibid.*

In addition to the statements embodied in more formal executive agreements, we have seen a welter of informal commitments made by the President and his chief lieutenants, often in statements made on the occasion of State visits. These sometimes offhand remarks also create expectations that the United States stands ready to assist other countries in the event of aggression from any source, at any time.

Again from the strictly legal point of view, I suppose that because these agreements and statements are technically conditional, they are constitutional. The problem develops when these quasi-commitments come home to roost. If trouble were to develop in Spain, or in another country that has received some kind of non-treaty assurance, it would turn to the United States for assistance, and understandably so. At once, our "word" would be at stake and pressures to take action would mount.

The unrestricted availability of the executive agreement as a vehicle for concluding international defense understandings has made this quasi-commitment problem both acute and dangerous. In this vital area of national interest, the Congress has often been ignored because it is easier to do so and the authority exists for the President to act alone.

IV

To recapitulate, it is my view that the executive agreement authority has a sound basis in constitutional law. However, I think that the free use of executive agreement authority has resulted in a tendency towards undue secrecy and has proliferated assurances of support that have created expectations among a large number of foreign countries. I therefore would like to see proposals adopted to curb these tendencies.

Turning to the bill you have introduced, Mr. Chairman, I sympathize with and support its intention. It makes good sense to have international agreements come before the houses of Congress for consideration before they become effective. The bill does raise, however, two questions that I should like to discuss.

First, the bill would apply to all executive agreements; that is, any international agreement or commitment of the United States other than a treaty. This coverage would, I gather, include those agreements made by the President relying solely on his constitutional authority, such as agreements to recognize a foreign government, to settle claims, to cease hostilities, and to take other actions that, under our system, have been left to the President alone. In these cases, I do not believe the Congress could constitutionally take action, as envisaged in Section 1(b) of your bill, to render such an agreement ineffective. For this reason, I believe that Section 1(b) should be made applicable only to those executive agreements entered into at least in part in reliance upon legislation.

Secondly, I am not sure that a concurrent resolution is constitutionally adequate to overturn an executive agreement based upon existing legislation. If we assume that the Congress has, by statute, authorized the President to enter into a particular agreement, that authorization continues to exist until the statute is repealed. I think there is serious constitutional question whether the Congress can repeal legislation simply by passing a concurrent resolution, which does not go to the President.¹⁰ One way of overcoming this problem might be to provide that no existing or future grant of congressional authority to the President may hereafter be used as the basis of implementing an executive agreement unless the procedures of Section 1 of the bill are followed. While this approach is not wholly free from constitutional question, I believe it rests on more secure underpinnings of congressional authority.

The Ervin bill would do much to eliminate the problems of secrecy surrounding the negotiation and implementation of executive agreements. It would also give the Congress an opportunity to reconsider its grants of authority to the President to make agreements in the light of what he does with that authority.

But the bill would leave relatively untouched the problem of quasi-commitments—statements by the President or his chief lieutenants that do not *legally* commit the United States to take action, but which nonetheless create expectations by other countries that we will act. I doubt that this problem is

¹⁰ Of course, a concurrent resolution could have no effect to limit the President in the exercise of his constitutional powers.

susceptible to procedural remedy. It is not realistic to attempt to gag the President nor is it likely that reporting requirements would have a very significant impact.

The root of the problem, I believe, lies in the Congress itself. Since the early 1950's, most congressional forays into foreign policy have been extraordinarily narrow gauged. Thus, the foreign assistance legislation has been burdened over the years with myriad restrictive provisions generally reflecting congressional pique at some presidential decision or frustration with the policies of other countries. I am always struck that these restrictions annually take up days of debate, while matters like the Tonkin Gulf Resolution virtually sail through the legislative process.

It is only very recently that the more basic and important questions of foreign policy have been addressed by the Congress—for example, how does foreign assistance generate quasi-commitments of the United States, or, how does military assistance tie us to particular political constituencies in other countries? These are the kind of questions that Congress is particularly suited to examine by carefully taking testimony and conducting measured debate.

I think a good case can be made that Congress should adopt this role and leave the day-to-day decisions to presidential discretion. If the Congress decides to consider the direction and goals of our foreign policy, I think the commitments problem will diminish. Because, at that time, it will become apparent to all other countries that the President has a partner in making important foreign policy decisions.

What is required is the desire and ability on the part of Congress to participate in making major policy decisions. The desire appears to be developing rapidly: S. 3475 and the other proposals seeking to reassert congressional authority in this area are testimony to that. What remains to be supplied is a congressional commitment to a new role in the foreign policy area, with a new set of priorities and a new awareness of where effective action can take place.

V

Now, in conclusion, institutional changes of the kind we have discussed today cannot make men wiser or give them more foresight. Nor can it be said that greater participation by the Congress in making our foreign policy will automatically mean an improvement of that policy. But Congress, by sensibly debating the major issues, can provide the long view that now appears to be missing in our foreign relations. For this reason, I am gratified to see that this committee and Congress as a whole are considering ways to play a more responsible role in making our foreign policy.

Mr. CLIFFORD. I wish to thank you for the invitation to appear here today to discuss the scope of the treaty-making and executive agreement authorities. I appreciate this opportunity to give you my views on this question which I believe is so important in our system of the separation of powers.

This is a subject that has concerned the Congress, from time to time, through the years. I can recall at least two major inquiries and it is interesting to recall the positions taken on the issues in those cases.

The first instance was at the close of World War II, when U.S. membership in the United Nations was under consideration. Because of President Wilson's inability to secure two-thirds of the Senate in favor of a treaty calling for our membership in the League of Nations, many feared a similar setback on the U.N. Some suggested that our participation in the United Nations be based on an executive agreement implemented through ordinary legislation; in this manner, the requirement of a two-thirds vote in the Senate could be avoided. The question debated at that time was whether such an executive agreement would be legally equivalent to a treaty. As we all know, the issue was not put to the test, since the United States used

the treaty process to adhere to the U.N. Charter and the other international agreements of the period. In each case, however, implementing legislation was also secured.

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I should begin by stressing my own belief in a strong presidency. I need not review all the reasons why, in today's world, our Chief Executive must be able to provide strong leadership both domestically and internationally. Any undue restrictions would gravely impair the President's ability to carry out the responsibilities we now expect him to bear.

But, despite this belief, I am troubled about the recent trend toward unilateral exercise of Presidential powers in the international arena. As a consequence, our foreign policy has all too often been based upon the proposition that the United States should act as the world's policeman. Shortly after the cold war began in earnest, we sought to build a strong alliance against communistic aggression. As the years passed, we enlisted as many nations as possible in this cause. Our efforts to this end were assisted by grants of economic and military aid, but they included a great many formal and informal commitments to the defense of those other nations. While resistance to the threat of Soviet aggression in Europe and elsewhere was necessary, I am afraid we became preoccupied with our effort to forge alliances and let it go far beyond our realistic needs. The result has been, I think, to overstretch our capabilities and to make commitments creating exaggerated expectations in others. This expansive view of our world role led directly to Vietnam.

The specific question you have asked me to discuss is the relationship between the treaty and the executive agreement as a means of implementing our foreign relations. This question, Mr. Chairman, involves legal aspects central to the bill—S. 3475—you recently introduced. It is a question that also raises many important policy considerations. I want to discuss both of these matters, but first let me offer my views, as a lawyer, on the strictly legal aspects.

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The cases establish that an executive agreement is the supreme law of the land in the sense of superseding contrary State law.

I make these statements without in each instance saying that it is my belief. That is understood, because it is my statement.

It is also clear that congressional delegations of power to the President in the international field may be a good deal broader and less precise than would constitutionally be permitted in delegations involving domestic affairs. In sum, while there is some contrary authority, I think that the law supports the use of the executive agreement in any case in which the United States is not required to take any action or where such action as we agree to take is already authorized by the Constitution or our laws.

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Having now unburdened myself of my opinion that there is no important legal distinction between a treaty and an executive agree-

ment, let me turn to some practical differences I see between the two and some problems those differences can create.

The first difficulty results from the fact that an executive agreement can be concluded and come into force in secret and without congressional participation. If the President is exercising his constitutional powers, or if he has received advance congressional authorization, he can conclude and implement the agreement without any public announcement. I do not argue that no agreements should be secret. But I do believe that the ready availability of a means for reaching international understanding that can be made and carried out in secret has, by itself, generated unnecessary secrecy.

Examples of this tendency are all too common. We have a long list of secret agreements regarding the supply of military hardware and technical assistance. The use of foreign bases and even the employment in combat of our Armed Forces have been the subject of secret understandings. But secrecy pervades far more than the military agreement; it is now not uncommon to have a confidential side letter accompanying routine economic agreements. Often, the business interests concerned are let in on the secret, but the public—even the Congress—are not.

If we have learned nothing else from Vietnam, it must be clear to all that making foreign policy amidst secrecy is fraught with danger. The executive agreement is only a tool, and, as such, it cannot be blamed for the uses to which it is put. But I cannot help believing that had the executive agreement been used with greater discipline, our foreign policy would not now rely so much on keeping information from our people. I am happy that Congress is now thinking of imposing that discipline.

The second problem I have with the use of executive agreements is limited to the so-called national commitment area, that is, where the United States commits itself to take action to assist other countries in defense against armed attack.

At the outset, I should note that our defense commitments have not obligated us automatically to come to the aid of any other country. Even when embodied in treaties, our understandings have been couched in conditional terms. Nonetheless, these conditional agreements have formed the keystone of the system of mutual defense arrangements we have built since World War II. Not surprisingly, a central element of our foreign policy has been to convince friend and foe that what are conditional commitments will in fact determine our response to aggression.

I make this point because it shows that mutual defense treaty commitments tend to take on a life of their own, that their conditional nature becomes subjugated to the need to preserve the "word" of the United States. The same metamorphosis can apply to conditional commitments embodied in executive agreements never submitted to the Senate or the Congress as a whole. Yet, the justification for making these agreements without involving the Congress is that they do not obligate the United States to act; they are only conditional commitments. Thus, since we agree only that we will take such action as we may consider appropriate in the event of a threat to Spain, no congressional involvement is sought.

I find it difficult to accept this reasoning. We have told Spain that its security and integrity are necessary for the common security of our two countries. Is this very much different from the statement in the North Atlantic Treaty that an attack on one signatory shall be considered an attack against them all? Each, I submit, creates the same kind of expectation in the mind of the other signatories. Each is intended to have a deterrent effect upon a possible aggressor. Yet one statement has been made without any specific authorization from Congress.

In addition to the statements embodied in more formal executive agreements, we have seen a welter of informal commitments made by the President and his chief lieutenants, often in statements made on the occasion of State visits. These sometimes offhand remarks also create expectations that the United States stands ready to assist other countries in the event of aggression from any source, at any time.

Again from the strictly legal point of view, I suppose that because these agreements and statements are technically conditional, they are constitutional. The problem develops when these quasi-commitments come home to roost. If trouble were to develop in Spain, or in another country that has received some kind of nontreaty assurance, it would turn to the United States for assistance, and understandably so. At once, our "word" would be at stake and pressures to take action would mount.

The unrestricted availability of the executive agreement as a vehicle for concluding international defense understandings has made this quasi-commitment problem both acute and dangerous. In this vital area of national interest, the Congress has often been ignored because it is easier to do so and the authority exists for the President to act alone.

To recapitulate it is my view that the executive agreement authority has a sound basis in constitutional law. However, I think that the free use of executive agreement authority has resulted in a tendency towards undue secrecy and has proliferated assurances of support that have created expectations among a large number of foreign countries. I therefore would like to see proposals adopted to curb these tendencies.

Turning to the bill you have introduced, Mr. Chairman, I sympathize with and support its intention. It makes good sense to have international agreements come before the Houses of Congress for consideration before they become effective. The bill does raise, however, two questions that I should like to discuss.

First, the bill would apply to all executive agreements; that is, any international agreement or commitment of the United States other than a treaty. This coverage would, I gather, include those agreements made by the President relying solely on his constitutional authority, such as agreements to recognize a foreign government, to settle claims, to cease hostilities, and to take other actions that, under our system, have been left to the President alone. In these cases, I do not believe the Congress could constitutionally take action, as envisaged in section 1(b) of your bill, to render such an agreement ineffective. For this reason, I believe that section 1(b)

should be made applicable only to those executive agreements entered into at least in part in reliance upon legislation.

Secondly, I am not sure that a concurrent resolution is constitutionally adequate to overturn an executive agreement based upon existing legislation. If we assume that the Congress has, by statute, authorized the President to enter into a particular agreement, that authorization continues to exist until the statute is repealed. I think there is serious constitutional question whether the Congress can repeal legislation simply by passing a concurrent resolution, which does not go to the President. One way of overcoming this problem might be to provide that no existing or future grant of congressional authority to the President may hereafter be used as the basis of implementing an executive agreement unless the procedures of section 1 of the bill are followed. While this approach is not wholly free from constitutional question, I believe it rests on more secure underpinnings of congressional authority.

The Ervin bill would do much to eliminate the problems of secrecy surrounding the negotiation and implementation of executive agreements. It would also give the Congress an opportunity to reconsider its grants of authority to the President to make agreements in the light of what he does with that authority.

But the bill would leave relatively untouched the problem of quasi-commitments—statements by the President or his chief lieutenants that do not legally commit the United States to take action, but which nonetheless create expectations by other countries that we will act. I doubt that this problem is susceptible to procedural remedy. It is not realistic to attempt to gag the President nor is it likely that reporting requirements would have a very significant impact.

The root of the problem, I believe, lies in the Congress itself. Since the early 1950's, most congressional forays into foreign policy have been extraordinarily narrow gauged. Thus, the foreign assistance legislation has been burdened over the years with myriad restrictive provisions generally reflecting congressional pique at some presidential decision or frustration with the policies of other countries. I am always struck that these restrictions annually take up days of debate, while matters like the Tonkin Gulf Resolution virtually sail through the legislative process.

It is only very recently that the more basic and important questions of foreign policy have been addressed by the Congress—for example, how does foreign assistance generate quasi-commitments of the United States, or, how does military assistance tie us to particular political constituencies in other countries? These are the kind of questions that Congress is particularly suited to examine by carefully taking testimony and conducting measured debate.

I think a good case can be made that Congress should adopt this role and leave the day-to-day decisions to presidential discretion. If the Congress decides to consider the direction and goals of our foreign policy, I think the commitments problem will diminish. Because, at that time, it will become apparent to all other countries that the President has a partner in making important foreign policy decisions.

What is required is the desire and ability on the part of Congress to participate in making major foreign policy decisions. The desire

appears to be developing rapidly; S. 3475 and the other proposals seeking to reassert congressional authority in this area are testimony to that. What remains to be supplied is a congressional commitment to a new role in the foreign policy area, with a new set of priorities and a new awareness of where effective action can take place.

Now, in conclusion: Institutional changes of the kind we have discussed today cannot make men wiser or give them more foresight. Nor can it be said that greater participation by the Congress in making our foreign policy will automatically mean an improvement of that policy. But Congress, by sensibly debating the major issues, can provide the long view that now appears to be missing in our foreign relations. For this reason, I am gratified to see that this committee and Congress as a whole are considering ways to play a more responsible role in making our foreign policy.

Thank you, Mr. Chairman.

Senator ERVIN. Well, I will have to concede that there are Supreme Court decisions which sustain your position that executive agreements do have a legal standing. I must also confess that those decisions give me much pause. It is undoubtedly, as you point out, within the prerogatives of the President to determine whether he will recognize a foreign nation, and, as we all know, President Franklin D. Roosevelt, after many years of nonrecognition on the part of this Government, recognized the Communist regime in Russia. One of his actions connected with that recognition was an executive agreement which was upheld, I believe, in the *Pink* case where the President made an executive agreement which had the effect of setting aside the law of the State of New York as to subjecting certain property to answerability for liability to the citizens of New York.

I am also concerned with some of the expressions in the *Missouri* case. I could sort of reconcile myself on the *Missouri* case on the grounds that the migratory fowl involved were birds engaged in interstate and foreign commerce, in that they flew from one State to another, but still then on that basis it is a pretty slim basis to put them under the interstate commerce clause, since the hunting of those birds under the laws of the States has also been a matter regarded as falling within the domain of the State rather than the Federal Government.

I also take some consolation in the fact that there is a story which I have never been able to verify, of a very successful midwest lawyer who never conceded that the court was right when they decided a case against him. He died leaving a substantial estate, and some of his heirs attempted to displace his testamentary disposition of his property. They attacked it on the ground that he lacked testamentary capacity, which they undertook to prove by evidence of his unwillingness to concede that the court was ever right in deciding a case against him. I am told that the court decided that this was not evidence of his incapability to give testament. The decision is consoling, for I am unable to give mental acceptance to some of these cases which do establish the propositions which you have pointed out.

Mr. CLIFFORD. I read the *Belmont* case, and the *Curtiss-Wright* case, and the *Pink* case, together with other supporting cases as constituting Supreme Court approval of the existence of the presiden-

tial power to make executive agreements. Also, I have been intrigued by an incident in American history when President Cleveland was meeting with his Cabinet, and after an erudite, lengthy academic discussion, he said to them:

Gentlemen, you overlook the fact that what we are considering is a condition and not a theory.

I read someplace that in the first 50 years of our Government, there were almost as many executive agreements entered into as there were treaties. In the second 50 years, a great many more executive agreements than treaties, and in the third 50 years, five or 10 times as many executive agreements as treaties, and, as the chairman pointed out, we have in existence today over 4,000 executive agreements.

Now, for us to sit here in this ivory tower and say we are not going to approve the constitutionality of executive agreements is beside the point. I think you have stated it correctly. Let us accept the existence of the executive agreement, as your bill does. You not only refer to executive agreements in the preamble of your bill, but you take it upon yourself to describe what you consider an executive agreement to be. They do exist. The President has authority in a number of areas, and I think the correct way is to proceed as you have done, assume that they exist, assume that he has powers, but now let us control that power.

Senator ERVIN. Well, I certainly agree that executive agreements do have a real function to serve in our scheme of government. They can serve a real purpose in the area of foreign policy. What prompts the bill in part is that I am concerned with the secrecy which accompanies so many of the executive agreements. I certainly agree with you that they serve a function and appreciate your suggestions to the effect that where the making of an executive agreement falls within the undoubted constitutional power of the President, that Congress cannot regulate those executive agreements.

In other words, taking the question of the plainest case, as you point out, where the question involved is the recognition of a foreign country. Undoubtedly, under the Constitution that power belongs to the President and not to the Congress, and I also certainly agree that the bill can not invalidate a delegated Presidential power. One of the purposes of the hearing is to have inadvertencies or defects in the legislation pointed out so they can be corrected.

Mr. CLIFFORD. In this regard, I think the committee would want to look with care at the language which would permit the Congress to overrule or disallow an executive agreement when that executive agreement is in accord with legislation already passed by Congress. You could get into trouble in attempting to overrule or rescind an act of Congress legally signed by the President some years before by passing a concurrent resolution of the Senate and the House saying that a certain action under that law is not appropriate.

Senator ERVIN. Well, I would certainly have to concede, that that is a point which is very valid, because a statute requires the signature of the President as well as the passage by both Houses of Congress. Where the President is exercising authority under an act of Congress, I think a serious constitutional question arises whether

Congress, by concurrent resolution which does not have to go to the President for his signature or his approval or disapproval would have the power in such a situation, as you point out, to act as this bill undertakes to authorize the Congress to act.

I have been concerned ever since I have been in the Senate about one matter you talked about here. The President is making a visit to a foreign country, or some of the Cabinet such as the Secretary of State may visit a foreign country, and make oral commitments to the people of that nation who do not understand our system of government—and I will say the same thing about Senators or Congressmen. They undertake to speak, and many foreigners think that they have the power as they would have in their own country in many cases to make binding commitments. I do not know any way that we can regulate that. As you point out, it is beyond regulating.

MR. CLIFFORD. It has created some of the gravest dangers. Some of our top officials have made comments with reference to Cambodia that I think have created impressions in Cambodia that we have what would be considered to be a mutual-assistance pact and that we would come to the assistance of Cambodia if their present government is threatened.

I might say in that regard also, without attempting to be hypercritical, that I recall a statement made some time ago by President Nixon when he was visiting in Thailand, and at that time he said, in substance: "We will stand by these brave people and assist them in turning back aggression, whether from without or from within." And I thought we had all better stay awake that night and think about what that commitment meant. If some kind of civil disturbance started within Thailand, which some have described as having the same the origin as the Vietnamese difficulty, we would be in Thailand taking one side against another side within Thailand. I thought it was an extraordinarily dangerous statement for a President to make.

SENATOR ERVIN. Yes. Some time ago I attempted to make a study of the way we got involved in Vietnam, and it is a long story. I was astounded to find that on several occasions our Presidents made statements which the people of that area could only interpret as a commitment by the President of American protection. At the time many of these statements were made there was nothing whatever, no action on the part of the Congress, which would authorize the President to make any statements of that kind or anything to indicate that Congress approved of those statements. And that was long before the Tonkin Gulf Resolution. From my study of the SEATO Treaty, I was never able to find anything in that agreement which bound us to take any of the action we have taken over there simply because it provided that no obligation would be binding on us unless it was assumed in the manner provided by our constitutional processes. I sometimes think we sort of talked our way into our present involvement in Southeast Asia largely through remarks made by Presidents for which there was not authority outside of a proclivity to talk.

MR. CLIFFORD. I think that is very true.

As you will recall, neither South Vietnam nor Cambodia is a signatory to the SEATO Treaty. They are merely protocol members,

and yet the assumption existed that some kind of a commitment was made. But now that introduces a question of even more acute interest now. The Tonkin Gulf Resolution was interpreted—and I think properly so—by President Johnson as having given him authority to send American troops and engage in military activity in Vietnam.

But what is the authority of the President today to continue on with that military activity and even to expand it in some directions, because the Gulf of Tonkin Resolution has now been repealed?

Senator ERVIN. That is the thing that compelled me to vote against its repeal. I was on the Senate Armed Services Committee when Secretary Rusk and Secretary McNamara appeared before us and asked us to pass the Gulf of Tonkin Resolution. I asked them some questions at that time, and I did not see anything in the answers they gave that showed we had any commitment as a nation, absent the resolution.

The broad language of the Tonkin Gulf Resolution did not escape me at the time. I interpreted it very broadly, and it undoubtedly conferred the power on the President to use the Armed Forces in Southeast Asia to repel any kind of aggression from any area. I was astounded when the administration got behind the repeal of the Tonkin Gulf Resolution after opposing it, because, to my mind, the clause about the declaration of war, according to the way I interpret the Constitution, recognizes two kinds of war. One is an offensive war which requires a declaration of war by the Congress before the President has constitutional power to use our Armed Forces. The other is a constitutional recognition, in two places, that it is the duty of the President to fight a defensive war; that is, to repel an invasion. Article IV, section 4 expressly spells that out. It is the duty of the United States to protect any State against invasion, and we even have a clause near the end of article I that says that even a State can wage war in self-defense if the time does not permit delays. So, it seems to me that the administration was very unwise in apparently advocating the repeal of the Gulf of Tonkin Resolution, because I have never been able to find, outside of purely defensive things, what authority the President has to act after the repeal.

Mr. CLIFFORD. One of the values of your bill and this type of hearing is to go into a deeper and even more significant question that exists in our country today. Our Government is supposed to act as the result of the will of the people.

Now, the will of the people is best manifested through the Congress of the United States. We do not have referenda on great issues as they do in some countries. But how could one explain this following situation:

I believe today the overwhelming weight of the opinion in this country is against the expanding of our aerial attacks and naval attacks in North Vietnam. In addition, I think that the people are deeply concerned about the taxes that they pay today, and yet without any consultation with the Congress, which is really the closest representative of the people, a policy is instituted which is costing tens of millions of dollars.

We have read of the sorties of the B-52's. My recollection is that every time a B-52 flies over North Vietnam it costs us \$40,000. Do

the people get any choice as to whether they wish their money to be spent in that manner or for the enormous naval flotilla that we have assembled?

Now, I think, as you go into the narrower problem of executive agreements, there is also the question of the conduct of military activities. Must there not be some closer kind of relationship between the Executive and the Congress so that the American people can exert their will in order to have an impact upon executive decisions?

It is not taking place today.

Senator ERVIN. Well, I certainly agree, as stated before, that the executive agreement is a very useful tool for implementing foreign policy. I would restrict it, if I could, to the implementation of prior treaties or the implementation of acts of Congress. You have made a very helpful contribution to the study of the committee by pointing out that there are certain areas in which the President has the constitutional power to act without the consent of Congress and that Congress cannot legislate to control that, his action in those cases. This suggests a very appropriate amendment which should be made to this bill. Also, you have made a very helpful suggestion in respect to the necessity of amending the bill to allow for the fact that Congress lacks the power to nullify a prior act of Congress by a concurrent resolution which does not require the consent of the President. That is the purpose, as you suggested to begin with, of holding a hearing of this kind.

I want to thank you very much for those suggestions.

Professor Miller?

Professor MILLER. Thank you, Senator.

Mr. Clifford, I have some technical questions, if I may pose them to you.

I am interested in your views particularly on the nature of the power that Congress exercises if it does enact a bill such as this.

Do you have any doubts in your mind as to the constitutional power of Congress to enact this bill, subject, of course, to some refinements, such as you have suggested, but at least with the thrust of S. 3475?

Mr. CLIFFORD. I see no difficulties in that regard.

If you will look at Article I of our Constitution and note the broad authority given there, that the Congress shall have power to levy and collect duties, Congress shall have power to regulate commerce with foreign nations, which would relate very closely to this type of legislation, to establish a uniform rule of naturalization, to define felonies committed on the high seas and offenses against the law of nations, to declare war, to raise, support and maintain, an Army and Navy, and then note the sweeping clause that says that Congress shall have the right to make all laws which shall be necessary to carry out the aforementioned.

If you consider these powers under article I, and combine them with its power under article II in which it is given the right to advise and consent with the President on the question of entering into treaties, I find no difficulty at all in recognizing the power given to the Congress to pass this kind of law under our Constitution.

Professor MILLER. I might note, too, that article II, section 8, clause 18, the implied powers clause, gives Congress the power to

enact laws which are based on powers vested in other departments of government as well. So, would it not be the case, Mr. Clifford, that Congress under its implied powers clause could still enact this bill?

MR. CLIFFORD. I think probably so. I would not be quite so clear on that. I do not know that it has received the degree of clarification that one would like, but I would generally agree with that possibility.

PROFESSOR MILLER. Another question: In your testimony, you make the point—and I think rightfully so—that the President has the full power to recognize foreign governments. Why does that include the power to settle claims? Are you suggesting inherent power here because it takes in other actions that, under our system, have been left to the President alone?

I see no boundaries in your statement.

MR. CLIFFORD. It was in this regard that as I listened to Justice Goldberg I found myself in disagreement. I do not have any particular concern over what you call it, whether you call it inherent power or whether you call it the basic constitutional power. But when the Constitution says that the President shall be the chief executive of our country, when it says that he shall have the power to enter into treaties, that he shall have the power to appoint ministers and ambassadors, I find that this constitutes a sweeping delegation of power that I think our Presidents must have. I do not feel concern with the fact that the Constitution does not delineate the specific powers of the Presidency. No group of men, no matter how intelligent, or how scholarly, as our forefathers obviously were, would have the prescience to be able to foresee in 1787 what was going to exist in 1972. So, I think they gave him broad powers, and I think he has used that broad power to enter into executive agreements. And if we wanted to clarify the debate, I would take the position that there are inherent powers in the chief executive.

PROFESSOR MILLER. Let me pursue that just a moment, sir.

In settlement of claims, for example, such as under the recognition by President Roosevelt of the Soviet Union—and the *Pink* and *Belmont* cases brought this up—should not the Congress have the authority to take a look at the assignment of monetary claims owned by the former government of the Czar?

In other words, that is a claim, and should it be resolved according to executive agreement or New York State law?

You say that is the type of agreement the President has inherent authority to make?

MR. CLIFFORD. I would say, yes, I would go that far. I think that the President under his implied power of the Constitution has that right without any act of Congress. When a matter became a controversy between a State and what the court considered to be a higher law, that which the Constitution would refer to as the supreme law of the land, the Supreme Court has gone with the latter theory in deciding those cases.

PROFESSOR MILLER. But that went only to the State and Federal power. It did not go to a congressional-executive relationship; is that not true?

MR. CLIFFORD. Yes, I think that is true. But if the President of the United States has the power to recognize a foreign authority, and I think we can agree on that, then I think that this other power would follow logically. And with reference to the settling of claims, I think that would be a concomitant of his ability and right to exercise the power of recognition.

PROFESSOR MILLER. There are problems of the boundaries. I think it is an unsettled question. Would you agree that it is an unsettled constitutional question so far as definitive Supreme Court decisions are concerned?

MR. CLIFFORD. I would agree to that. And what I am doing is giving my opinion. The powers of the presidency, under modern conditions, have to be maintained and preserved. At the same time, I am suggesting my support for this legislation. I am not saying that this interferes constitutionally with that power. What I am suggesting is that this bill will assist in giving the public information on matters that I think should be public information and which, in many instances heretofore, have not been.

PROFESSOR MILLER. All right, sir.

I would like to get to some of the policy aspects of this as well. Before I do, I think it is fair to make just a statement concerning the concurrent resolution. President Roosevelt published a posthumous note of his agreement with your position on that. I think it is fair to say that there is no definitive Supreme Court case on whether a concurrent resolution can supersede an act of Congress or not.

MR. CLIFFORD. The logic would be against it, would it not? Suppose the Congress passes a law, and it then gets the President's signature, and then suppose there is but one simple act to perform under that law. I am making it easy. And the President performs that one simple act under the law, and then under this bill his action is sent up here, and within 60 days, by concurrent resolution, the Congress disapproves of his act.

What it is really doing is overruling past legislation by a concurrent resolution. I think the logic of that is poor.

PROFESSOR MILLER. All right, sir. The suggestion has been made, when the bill was first introduced by the Senator that this is an undue impediment on Executive power. It occurs to me that this is a rather innocuous interjection that Congress could make in this area.

In your opinion, are the provisions of this bill so stringent that it would unduly hamper the Executive?

MR. CLIFFORD. I do not consider it unduly stringent, but I certainly do not consider it the mildest action that the Congress could take.

The Case bill is much milder than this. The Case bill merely provides that the President, after having entered into an executive agreement, shall merely inform the Congress by filing it with the Congress, and they have no authority to take action with reference to it. I believe that the present administration is likely to disapprove heartily of this legislation. I think any number of Presidents, maybe most Presidents, would disapprove of this legislation. So I do not think it is particularly mild, when you consider that for years a President has had almost sole discretion as to whether he will utilize

the treaty route, or whether he will adopt the executive agreement route.

And in most instances, because it is so much easier, he adopts the executive agreement route. That is one reason why we are in the trouble we are in.

Now this bill says to the President, "You no longer can do that in most instances. You no longer have that discretion. You no longer can cut the Congress out of the decisionmaking process." This is so because with most executive agreements, leaving out those which he has the inherent power to execute, you must send those executive agreements to the Congress, and then for the first time in the history of this country the Congress shall have the right to disapprove of them. I consider it very substantial legislation.

PROFESSOR MILLER. Sir, in your experience, then, as Secretary of Defense, an adviser to several administrations, would it be a major or undue impediment on the conduct of our foreign affairs, in your judgment?

MR. CLIFFORD. It will be an impediment in the conduct of our foreign affairs. It will not, in my opinion, be an undue impediment. But, my point is this: The advantages of this legislation, in my opinion, far outweigh the disadvantages that might inure to an administration as it goes about its business, and those advantages are that the people would know more about what is going on in the formulation and carrying out of our country's foreign policy.

PROFESSOR MILLER. Thank you, sir. No further questions.

SENATOR ERVIN. When I had the privilege of sitting on the North Carolina Supreme Court, we had quite a legal controversy between two parties as to the meaning of an opinion which our chief justice had written. After listening to the argument, he said that the brethren had read the same book but they had drawn different conclusions. Similarly, I am compelled to say that I draw different conclusions from my reading of the Constitution. The fact that the Constitution says that the President is an executive officer of the Federal Government does not give him an inherent Executive power. My position is that the Constitution spells out in detail what his powers are as executive officer of the Federal Government.

Also, the supremacy clause of the Constitution says that this Constitution, and the acts of Congress passed pursuant thereto and treaties made on behalf of the United States, shall be the supreme law of the land. It does not say executive agreements.

I think that the chief executive officer has to execute treaties and acts of Congress, and, therefore, I think he has authority to make executive agreements which implement or carry out the terms of treaties or carry out the terms of acts of Congress.

I will have to concede that the *Pink* case and the *Belmont* case do not seem to coincide with my sound views on this subject. But I still maintain that the Supreme Court is like Homer in that it occasionally nods, too, and makes mistakes. I think that if the Supreme Court would interpret the Constitution correctly, especially the supremacy clause, it would have to say that the President could not make an executive agreement such as in the *Pink* and *Belmont* cases, amounted to an exercise of lawmaking power because they superseded the State law.

One of the great things about this marvelous document is that it sometimes affords, I think, grounds for very, very interesting debate.

Mr. CLIFFORD. I might suggest, Mr. Chairman, in that regard, I think your bill proceeds in the right direction because you and I might discuss at great length at our different views of what the Supreme Court cases mean, but I think your bill cuts through that debate and recognizes the existence of executive agreements. Your bill, in effect, says to the President, "Take us in on it; take the Congress in; go ahead and make executive agreements, but give us the right to study them." Many of them will just be routine, but there will be key agreements that occasionally come up that the Congress might disagree on, and it can then act on them.

I might make what I consider to be a practical suggestion. I believe if this bill becomes law, you would want to establish a joint staff of experienced individuals in this field so that the executive branch of Government could send executive agreements to that staff. Perhaps 18 out of 20, or 20 out of 30 would be routine, and you would not have to bother with them. They would not come up by the truckload, but they will surely come up by the cartload. In the Defense Department they enter into them by the hundreds.

Most of those will be routine. So, if you have an intelligent, able staff, they can winnow through this great mass and pick out the ones that the Congress should look at, and in that way I think a signal would be performed.

Senator ERVIN. Well, I certainly think that, regardless of whether or not executive agreements fit the Constitution in all respects, that, as you point out, we have had some disastrous policies resulting from the use of executive agreements. It is well to see if we can do something to minimize the danger which comes to the country from policies of that nature. This bill's purpose is to do something constructive in that field.

Your last suggestion is one that permits very thoughtful study about how this bill, if it is enacted, should be implemented—what procedure should be adopted to make it operate with the least detriment to the carrying on of the Government while at the same time promoting, as far as possible, the national security against unwise executive agreements.

Mr. EDMISTEN. Mr. Clifford, would you say that the recent agreements between the United States and the Azores and Bahrain should have had the attention of the Congress? Those were not routine matters, were they?

Mr. CLIFFORD. I would have to say that I am not particularly concerned about those agreements. If I had my wish, I would have preferred that they be sent to the Senate as treaties, but I am not aware of any deep significance in either the Azores agreement or the Bahrain. They have been in existence before.

Certainly the Azores agreement could be justified by the fact that Portugal is a signatory to the NATO Treaty, and that the authority existed under NATO.

In Bahrain we went in and replaced the British.

The value of this bill is, that even if they were entered into as executive agreements, under this legislation the Congress would still get a look at them. It takes that discretion away from the President,

and I think rightfully so, and gives the Congress a greater part in policy determination.

Senator ERVIN. Did you have questions?

Mr. ABRAMSON. Yes; just one question. On page 2 of the bill it discusses what I think is important about the public disclosure in the area of national security, and it says if in the opinion of the President, such an agreement should be adverse to the national security it would be viewed only in camera by the respective committees, and that seems a very wide delegation of discretion. I suppose my question to you is: Do you think that could be abused, and does it serve the end objective of getting the public informed, because we could, perhaps, have the same problem of having the Congress view these things and never ever have the public view them?

Mr. CLIFFORD. You must start with the premise, that in the conduct of foreign relations today, there have to be secret agreements. I do not believe that our country could conduct its affairs today without entering into secret agreements. The world is in that posture at the present time, and I think that Congress must be inordinately careful not to encroach upon that.

I read that part of the bill with care. I thought it wisely drawn. When a President thinks that a certain agreement must remain confidential, he so informs the proper committees of the Senate and the House and the two Houses must keep it confidential.

Now, I suggest it places a very real responsibility upon the Members of Congress, because if this bill became law and there were instances in which executive agreements were sent up that were highly secret, and highly sensitive and delicate, and leaks took place in the Congress, the results could be disadvantageous to our country.

So, it does increase the responsibility of Congress. As we all know, there is the oft-repeated statements that it is difficult to keep a secret in Congress. However, our outstanding disclosures lately, interestingly enough, have not come from the Congress. The Pentagon papers, for example, came from the executive branch of the Government, and the interesting colloquies that involved India and Pakistan did not come from the Congress.

So, perhaps both branches of Government must be more careful of the manner in which they conduct their business.

Mr. ABRAMSON. Thank you.

Senator ERVIN. Thank you very much. You have given a very thoughtful and very helpful statement to us, and we are greatly indebted to you for it.

Mr. CLIFFORD. Thank you very much.

BIOGRAPHICAL INFORMATION—CLARK M. CLIFFORD

Born in Fort Scott, Kansas, December 25, 1906, son of the late Frank Andrew Clifford and the late Georgia (McAdams) Clifford. Shortly thereafter the family moved to St. Louis, Missouri.

Attended public schools and then went to college and law school at Washington University in St. Louis, graduating in 1928.

Entered the practice of law in St. Louis in 1928 in association with Jacob M. Lashly.

Volunteered for service in the United States Naval Reserve in 1943, and received commission of Lieutenant (j.g.) Served as special assistant to Commander, Western Sea Frontier, later as assistant Naval Aide to the President, and as Naval Aide to the President.

Separated from the Service in 1946 with permanent rank of Captain.

Appointed Special Counsel to the President of the United States in June, 1946 by President Harry S. Truman. Served in that capacity until February 1, 1950.

In 1945, President Truman assigned him the task of conducting a study in depth of the unification of the Armed Services. He worked with the War Department, the Department of the Navy, other departments and agencies involved, and the Congress for two years thereafter. There finally resulted the passage of legislation in 1947 entitled "The National Security Act." He was one of the principal architects of this legislation.

Thereafter, he served as liaison between the White House and the new Secretary of Defense.

Again in 1949, he worked with the Secretary of Defense, other departments and the Congress to obtain passage of the "National Security Act Amendments of 1949", which greatly strengthened the authority of the Secretary of Defense and changed the national military establishment into a regular executive Department of Defense.

On February 1, 1950, he resigned as Counsel to the President and established a law firm in Washington, D. C. under the firm name of Clifford and Miller.

In 1960, he served as a member of the Committee on the Defense Establishment, appointed by Senator John F. Kennedy to survey the organization, management and administration of the Defense Department. This committee was chaired by Senator Stuart Symington.

Between November, 1960 and January, 1961 he represented President-elect Kennedy in the transition period involving the take-over of the Executive Branch of Government from the Eisenhower Administration.

In May 1961, President Kennedy appointed Mr. Clifford a member of the President's Foreign Intelligence Advisory Board. In April 1962, Dr. James Killian of M.I.T. resigned as Chairman of the Board, because of ill health, and Mr. Clifford was appointed Chairman by President Kennedy.

In 1965, Mr. Clifford made a trip to the Far East and visited certain countries in his capacity as Chairman of the Intelligence Board.

In 1966, he served as an advisor to President Johnson at the Manila Conference.

In 1967, Mr. Clifford and General Maxwell Taylor visited a number of Southeast Asian and Pacific countries as personal emissaries of President Johnson.

On January 19, 1968, President Johnson nominated him to be Secretary of Defense. On January 30, 1968, he was unanimously confirmed by the United States Senate. On March 1, 1968 he was sworn in as Secretary of Defense of the United States.

Mr. Clifford served as Secretary of Defense until January 20, 1969, after which he returned to the practice of law in Washington, D. C. as senior partner of the firm of Clifford, Warnke, Glass, McIlwain & Finney with offices at 815 Connecticut Avenue.

Mr. EDMISTEN. Mr. Chairman, the next witness is Dr. James A. Robinson, the president of Macalester College. Is Dr. Robinson here?

Senator ERVIN. I want to welcome you to the subcommittee and express our deep appreciation for your willingness to come and give us the benefit of your study, observations, and views on this very important question.

STATEMENT OF JAMES A. ROBINSON, PRESIDENT AND PROFESSOR OF POLITICAL SCIENCE, MACALESTER COLLEGE

Dr. ROBINSON. Thank you very much, Mr. Chairman. I appreciate your invitation to offer my views on your proposals today.

As one who is in his first year of a college presidency—on the campus where your colleague Senator Humphrey taught his latest class—I have become accustomed to taking more advice than I give.

Yet because of the significance of proposals now before Congress and this subcommittee, I will revert to the stereotypical role of the professor of political science, that of advice-giver. In doing so, I shall, however, try not to repeat what you may hear from other sources.

I promise to be brief. If my outline of major propositions interests you, I shall be glad to enlarge upon it. My presentation consists of three points.

First, I sense that the Nation is looking to Congress to play a more influential role in making foreign policy in the future than it has played in the recent past. In part, this expectation derives from discouragement with what is now widely regarded as a lamentable, regrettable, and I might add detestable experience in Vietnam. Mr. Chairman, many of us, including large numbers of college students, but not exclusively youth, thought that the presidential election of 1968 presaged an end to the war in Vietnam. I will not repeat to you the litany of criticisms of the enormously expensive and now largely empty efforts in Southeast Asia. A change of parties and of presidential control and 3 to 4 years time have not ended that war. The recent intensification of bombings has excited campuses and communities without being accompanied by any persuasive evidence that that war can be shortened by the bombings or that our fundamental national interests will be enhanced by them. These hearings, and similar congressional inquiries, are timely reminders that we may look to the legislative branch for help in avoiding future debacles such as the one into which we have plunged and seem not to be able to extricate ourselves.

Second, with all due respect, Mr. Chairman, I believe your bill S. 3475 misses the mark. As I understand the proposal now before you, the President would be required to submit all executive agreements to Congress for a period of 60 days' suspension during which a joint concurrent resolution could invalidate an agreement. I do not see that such a procedure would have prevented the major mistakes of recent foreign policy. While the proposed procedure appears to be a valuable check on Executive power, it overlooks the need for the Executive to be able to act decisively and confidently in the daily conduct of a large volume of technical understandings with other governments. Much as I appreciate the intent of the chairman's bill, and notwithstanding Mr. Goldberg's and Mr. Clifford's obviously greater experience than mine in this field, I believe it negative in its orientation and self-defeating in its effects.

This leads me to my third point. Congress needs to shed its primary tendencies toward negativism, trimming, suspending, vetoing, and amending. It needs to prepare itself for more positive, creative actions in foreign policy. It needs to organize itself to avoid reacting and to increase its capacity for anticipating.

Senator Ervin, your bill does not meet these objectives, and the reason it does not meet these objectives is that separation of power is not really the issue. Nor is limiting power the key solution to our difficulties in foreign affairs. On the contrary, power remains essential to the Nation and to each of its three coordinate branches, legislative, executive, and judicial. What is required is power that balances power, not merely by vetoing another branch's efforts, but by

competing with it for creative alternatives to contemporary problems.

Ten years ago, I wrote a book called "Congress and Foreign Policy Making." I argued for a conception of Congress' role as a positive not a negative one. Most reviewers thought I was overly sanguine about the potentialities of congressional influence and initiative in foreign affairs. The executive was considered the favored if not the exclusive party in this field. Congress' role was regarded as confined to limiting, amending, vetoing, or reviewing executive action.

After 10 years, there is greater interest in legislative action, but I confess such interest seems still to concentrate on stopping the executive from making a mistake rather than prompting that branch to find innovative alternatives.

Several years ago, I and many others outlined to the Joint Committee on the Organization of Congress a set of recommendations for making this branch more creative and constructive. Some slight progress has been made, but I believe, frankly, Congress still too often reacts rather than innovates.

And in meeting this objective, nothing is more vital than improving your access to information about foreign affairs. That implies dollars, for staff, for consultants, for studies, for travel, for publications. But, compared to the dollars misspent recently in this society of perverted priorities, what you need is minuscule. If Mr. Clifford's figure of \$40,000 per sortie is at all correct, that would provide an awful lot of creative information for Congress and the Executive alike.

In conclusion, Mr. Chairman, I believe that this committee has addressed itself to only half the problem, and perhaps the lesser half at that. Emphasizing the separation of power threatens to inhibit imaginative exercise of separate powers, Congressional as well as presidential. Saying "no" to an executive agreement may constitute a necessary condition for a creative alternative in foreign policy, but not a sufficient one. For this reason, I would welcome greater exploration of ways in which the House and Senate could get off the defensive in foreign policy making and increase their positive contributions to improving our relations with and among other nations.

I hope your subsequent efforts will pursue such a direction. If they do, I believe you will find additional ways to serve the Nation, to maintain its freedom and to secure peace with and among all others.

Senator ERVIN. Do you not believe that the Constitution separates the powers of the President and the Senate with respect to negotiating and approving treaties?

Dr. ROBINSON. Yes, sir.

Senator ERVIN. Then certainly this is a question of separation of powers?

Dr. ROBINSON. Yes, sir.

Senator ERVIN. Now, what limits do you think the Constitution puts on the President when it comes to making agreements with foreign nations?

Dr. ROBINSON. I read with some care the testimony taken in the case of hearings on the Case bill, which I, incidentally, would think would be a happy solution to this problem; that is to say, that all

executive agreements would have to be reported in some systematic, codified way, to Congress. But, I think that on discovery that any executive agreement, in the view of Congress has exceeded congressional policy or its intent, that Congress would, by affirmative action, undertake to repeal that executive agreement.

I am not for unlimited Presidential powers any more than I would be for unlimited congressional or judicial powers, but I think there are serious complications, one which I noticed this morning. I would like to refer to the exchange between Professor Miller and Ambassador Goldberg. I noticed that the question had to do with an example in which an executive agreement committed dollars from this country to another country.

Well, now, if such an executive agreement were brought before Congress, under the Ervin bill, and if that executive agreement were not overturned within 60 days, then it would seem to me that Congress would have, by its silence, given consent to that outflow of dollars, and yet would that not be a subversion of the appropriations provisions of the Constitution?

Senator ERVIN. I would question whether that would be because the Constitution says that no money shall be appropriated except by act of Congress.

Dr. ROBINSON. But if the President is obligated to uphold that agreement, to carry out that agreement by having signed it, and if Congress does not overturn it within 60 days, has not Congress given a kind of assent to it?

Senator ERVIN. What would be the effect of that executive agreement if Congress never heard of it?

Dr. ROBINSON. I assume that part of it could not take force.

Senator ERVIN. Under the present system, if it was not reported to Congress—

Dr. ROBINSON. Then the President would have to get the money from some place other than the appropriations, some contingency fund or otherwise.

Senator ERVIN. I do not believe Congress acts through acquiescence as far as appropriations are concerned. I think the Constitution explicitly says that no money shall be taken out of the Public Treasury except by appropriations authorized by the Congress.

Dr. ROBINSON. I understand that, but I wonder whether foreign governments read the Constitution as carefully as we do, and would they not think—

Senator ERVIN. That is fundamentally, I think, our big trouble in this field. Foreign peoples do not always understand our Constitution, and they often think that when the President says something—or even a Senator says something—that it represents how the Government speaks.

Now, I am very much intrigued, as I was intrigued by Mr. Clifford's testimony as to just what legal status an executive agreement has, since the Constitution says that we have three kinds of supreme law of the land—the Constitution, acts of Congress passed pursuant to the Constitution, and treaties.

I recognize that it is a useful instrument to implement a treaty or implement an act of Congress, but it certainly is not the supreme law of the land. I do not believe we have any kind of inferior law

of the land and, therefore, I cannot go along with some of the views that have been expressed by the Supreme Court in the *Pink* and the *Belmont* cases.

Do I understand that you take the position that executive agreements should be reported, and that Congress is entitled to know of them?

Dr. ROBINSON. Yes, I see no reason, except the obvious problems of disclosure of secret documents—

Senator ERVIN. But, the Congress should not take any action when it sees an executive agreement which undertakes to exercise the lawmaking power of Congress, or which calls for the expenditure of money that only Congress has authority to appropriate.

Dr. ROBINSON. Well, why cannot Congress, by an act of Congress, undertake to overturn such an agreement? Or, if there is reason to believe that the agreement is not in pursuance of an act of Congress, are there not recourses in the courts?

Now, I am not trained in the law, but I am not arguing the legal matters here. I am arguing the policy matters which are that I think the President cannot operate without executive action. I think this is the really fundamental problem, making policies that are not bound up in keeping the Executive from making a bad executive agreement, but how can Congress get the process to be more creative and avoid future Vietnams.

Senator ERVIN. I am also intrigued with your suggestion that the Congress ought to do something affirmative in the field of foreign policy. I would certainly welcome any suggestions you might make as to what affirmative action the Congress can take.

Dr. ROBINSON. If I could expand on that for just a minute, it seems to me the key word is information, and in the history of this country the power, the domination of one branch over the other, has oscillated. At one time there has been a strong Congress, and at other times a strong President.

But, in contemporary public policy, both with respect to foreign policy and domestic policy, by and large I think that the executive is the branch that is dominating the Congress rather than Congress dominating the executive, and you have tried to speculate about why that is the case.

Incidentally, this is true in virtually all other governments. As a matter of fact, when we criticize Congress for being weak, we ought to footnote such a statement and say that it has remained the strongest vis-a-vis the executive body, stronger than any other legislature in the world. It remains, in my judgment, less powerful than the executive, and this has by and large been the trend now for roughly 75 years, and that trend dates from the beginning of what I call the information revolution which is a byproduct of the industrial revolution. An interesting way of illustrating the importance of information and the different ways in which Congress and the executive respond to information is to recall the troubles in completing the census of 1880. 1880 was the first year in which the population of this country grew by more than 10 million in a single decade. Up to that time the Census Bureau processed the enumerations by hand, and by 1885 it became clear that the Census Bureau would

not complete the 1880 enumeration before having to take the 1890 enumeration.

And that is when the first mechanical data processing machine was invented, to process all of this material by machinery instead of by hand.

Simultaneously, or almost simultaneously, came the invention of the typewriter and Pitman's perfection of shorthand, and that just led to a profusion of paper.

We may think of the mimeograph machine as the forerunner to bulging briefcases and files, but the same effect was added by the introduction of data processing, carbon paper and shorthand.

Now, the Executive positioned itself better, somehow to respond to this information revolution. Typically we think of bureaucracy as being executive. There is no reason at all bureaucracy cannot exist in legislative or judicial branches, but the Executive prevailed because the bureaucrats have learned how to acquire, and screen and organize information much more effectively than has Congress.

In addition to their being more information, the industrial revolution also produced more problems, shifts in population, mobility, concentration in the cities, immigration, transportation, communications, and all of the rest which leads to more social problems.

So, with more information about more problems, and with the Executive having bureaucratized itself to handle that information, it got the upper hand, and by and large has kept it. And I think of the reports your committees do. Most of the information comes from the executive branch, and I think Congress has got to regain some of the information advantage before it can be more creative vis-a-vis the Executive.

Senator ERVIN. Well, I think that the weakness you point out in Congress is very substantially a result of party government, although we do not have party government in this country in the strict sense of the term, such as in England. But, the Executive has only one mind and one voice, while in Congress there are 100 Senators and 435 Congressmen. Unfortunately, Congress is at a disadvantage in this respect. When the President takes certain action and makes a certain proposal, there is a substantial percentage of Congress that will support him simply because they belong to his political party and think there is some party advantage in it. That really tends to disable Congress in its ability to take aggressive action in the field of foreign policy.

In other words, I find it very difficult to persuade other Senators to accept my sound views on many problems. It seems to me that Congress has an obligation to protect its legitimate sphere in the field of foreign policy.

Dr. ROBINSON. I do not quarrel with that.

Senator ERVIN. So, I do think that there is a very substantial question of the separation of powers as to whether or not Congress is going to sit by and let the President enter into executive agreements and circumvent the treaty-making process, because in the treaty-making process the President has to consult with Congress.

And I think executive agreements too often are used to circumvent the treaty-making process, and they constitute in legal effect, in many cases, a usurpation of the legislative power of the Congress.

Dr. ROBINSON. Have you given any consideration to proposing a constitutional amendment which would reduce the two-thirds requirement to a majority and share the treaty-making power with the House?

You see, my understanding is that one of the reasons an executive agreement is so profusely used, and was in the 1930s, is and was because in trade agreements and in other matters, the administration thought getting two-thirds vote of the Senate was too high.

Senator ERVIN. No, I have never given thought to that simply because it is too much of a job to get the Constitution amended. You have to get the two-thirds of each House to vote for a constitutional proposal, and you also have to get three-fourths of the States.

Dr. ROBINSON. Leaving aside that obstacle, assuming you could do that, would that not reduce the temptation to use the executive agreement?

Senator ERVIN. No, I think the two-thirds is a protection against the power of the Executive.

Dr. ROBINSON. But that is one of the factors encouraging the use of agreements.

Senator ERVIN. I think it would increase the power of the Executive in requiring a majority rather than two-thirds. Now, it might obviate some executive agreements, there is no question about that, but it would increase the power of the President and decrease the power of the Senate.

Dr. ROBINSON. But would increase that of the House, by involving the House in treaties.

Senator ERVIN. Well, yes, it would increase the power of the House.

Of course, the Congress cannot make a treaty or negotiate a treaty. George Washington learned that, to his sorrow, when he took the advice and consent literally, and he came down and wanted to sit in the Senate and get the Senate to advise him on what he had put in a treaty, as I recall, and he did not fare very well. He did not receive the respect he was due.

But, I am interested in how the Congress can be more aggressive in this field and take on more power and exercise more power.

Dr. ROBINSON. I think it has to improve its information resources.

Senator ERVIN. It would have to get a lot of foreign information that now is available to the President through the CIA which we do not get. We need information about foreign countries and what is going on in them in order to deal with foreign policy. We do not get very much of that, except when we go on a touring junket. I would certainly agree that we need more information, but, our capacity to absorb information is somewhat limited.

I agree that the Executive gets much more appropriations for information. We are rather negligent about it with our own allowances, but we are ever generous when we go to giving it to the Executive.

Professor MILLER. Just a couple of questions, Senator.

Am I correct, Dr. Robinson, in inferring that you think that the bill does not go far enough? You think that the bill is OK, but you would prefer to see something even stronger?

Dr. ROBINSON. No, I am sorry, you have drawn the wrong inference. I would endorse the Case bill. I think the Ervin bill would, frankly, be a nuisance.

Now, I grant you that Mr. Goldberg and Mr. Clifford deserve greater weight in what they said of this than I, but I should think that this would be a handicap in the day-to-day conduct of a lot of technical details.

Professor MILLER. Let us get to the question of powers. As a political scientist, do you see any difficulties in the power of the Congress to enact such a statute as this?

Dr. ROBINSON. No, but it seems to me that is a legal question more than a political science question. But, as a political scientist I see no obstacles.

Professor MILLER. Do you have some views on the inherent power of the Executive to conduct foreign relations?

Dr. ROBINSON. No.

Professor MILLER. Would you say it is a fair statement that your position would be that it is a shared power with the Congress?

Dr. ROBINSON. I think that what we are going to have in some ultimate critical event is that we may very well have the President taking action in the name of inherent powers and later trying to get justification for it. The President is not going to stand by in some times of crises that I can imagine, and quarrel about whether it is a shared power or implied power, or delegated power.

Professor MILLER. Well, we are not really talking about the times of crises. We are talking about the routine.

Dr. ROBINSON. Right. On that it seems to me the claim of inherent power is an unnecessary one and an undesirable one, I might add.

Professor MILLER. Now, I do not really understand the reasons why this would substantially hamper the conduct of foreign affairs, if an executive agreement has to be laid before Congress for 60 days. I do not understand why.

Dr. ROBINSON. I do not think that a Secretary of State, or Defense, or a clerk in one of their departments executing such an agreement on behalf of the President, would be able to give assurances to a foreign party that this would stand up.

Professor MILLER. Let me interrupt there. Ever since Woodrow Wilson and the League of Nations, every nation in the world has known about the constitutional processes of this country, so you cannot give assurances if you negotiate a treaty, either.

Dr. ROBINSON. That is right.

Professor MILLER. So, I do not see that this is really a problem.

Dr. ROBINSON. But surely for the 200 agreements that are negotiated every year, and which the testimony of Mr. Stevenson of the State Department in the Case hearings indicates, that 95, 98 percent of those are in pursuit of an act of Congress, and surely this additional doubt needs not to be raised in the day-to-day conduct for foreign affairs when most of these are relatively minor rate in substance.

Professor MILLER. Well, I might suggest, as a reply, to that that most of them would routinely go through and be approved without

action by the Congress, and it is only a matter of waiting 60 days so that the actual hampering effect would be minimal at best.

Dr. ROBINSON. I am not clear why Congress wants to look at what I would regard as primarily administrative acts. It seems to me that this may lead to an intermixture of legislative and executive powers, that it is not separation of powers, but interpenetrative.

Professor MILLER. As you know, Dr. Robinson, many administrative actions are laid before Congress before they go into effect. We have coming into agreement provisions which Congress routinely puts into domestic statutes. Are you suggesting something is different between domestic and foreign that makes foreign particularly critical as far as policymaking?

Dr. ROBINSON. No. I am suggesting that simply being suspicious of the Executive is not going to get us an improved foreign policymaking process.

Professor MILLER. But, it is done all the time in other parts of the government and in other government processes, and that is very spiritous as a part of the Constitution. Are you suspicious of any power?

Dr. ROBINSON. It is concentration on the separation of powers or suspicion of the other branches that diverts attention from being more creative.

Professor MILLER. I would only make a statement and then conclude, Senator. I think Dr. Robinson has made a valid point about the need for innovative action, but I think the Congress needs substantial help, particularly from the academic community, perhaps, of which I am a member.

Dr. ROBINSON. I agree.

Professor MILLER. And I do not see it forthcoming, though I would like to see it forthcoming. In lieu of that, I would think that this bill, at least moves into the direction of the problem. If we cannot solve all of the problems with one bill, at least we can solve part of them, or help solve part of them.

That is a statement, and not a question, unless you wish to comment.

Senator ERVIN. George Washington gave us some very good advice in his farewell address to the American people when he pointed out that the Constitution divided the powers of the Government among the three departments. He said that it was incumbent on each department to prevent the other departments from encroaching upon its domain.

Now we have situations in which the Executive makes executive agreements which promise payment of vast sums of money out of the Federal Treasury to foreign countries. He undertakes to exercise at least the powers of Congress, the power of the purse on many occasions, and it seems to me that this bill undoubtedly would impede the absolute power of some clerk or official in the executive branch or even the President himself to usurp and exercise constitutional congressional powers. I think that perhaps it is pretty well to hamstring the President in exercising powers which really do not belong to his office.

I do not see where it would be of great advantage to the American people. I think we got involved in Southeast Asia by gradual usurpation of powers on the part of the executive branch of the

Government. The President ought to be restrained where he goes beyond his authority.

The great bulk of executive agreements are made by the President or under his authority to implement treaties that have already been approved by the Senate, or to implement acts which have been passed by both Houses of the Legislature. Those would be perfectly legitimate.

Where most of them would be routine, I do not think it would impede anyone very much. However, I do not think the President has the power under the Constitution to make promises to foreign nations which would obligate the United States to do something which lies within the power of Congress. Despite your disagreement with me, I do not think that the separation of powers is involved here. I think that what is really involved is the treaty-making power. In dealing with foreign nations, if the President undertakes to make a financial obligation, he exceeds his authority, for only the Congress has the power of the purse.

But, you have made a most interesting contribution to our debate. We appreciate your appearance and thank you for your help.

The subcommittee will stand in recess until 3 o'clock.

(Whereupon, at 12:55 p.m., the hearing was recessed to reconvene at 3 p.m. this same day.)

Biographical Information—James A. Robinson

James A. Robinson is President and Professor of Political Science Macalester College, St. Paul, Minnesota. Prior to assuming these positions on August 1, 1971, he was for two years Provost and Vice President for Academic Affairs, The Ohio State University. He became the chief academic officer of Ohio State after five years as a Professor of Political Science at that institution. Dr. Robinson taught previously at Northwestern University where he earned the Ph.D. in 1957. He was a Congressional Fellow of the American Political Science Association in 1957-58 and has undertaken postdoctoral work at Stanford University and the University of Michigan. His books on Congress include *The House Rules Committee* (Indianapolis and New York Bobbs-Merrill 1963) and *Congress and Foreign Policy-Making: A Study in Legislative Influence and Initiative* (Homewood, Illinois, 1962, revised edition 1967).

AFTERNOON SESSION

Senator ERVIN. The subcommittee will come to order.

Senator Fulbright, I wish to welcome you to the subcommittee and express our deep appreciation for your willingness to appear and give us the benefit of your experience and observations and views in this field.

I do not know any person in the Senate who has had more experience in this field and is more conscious of the necessity of the legislative branch of the Government in general, and the Senate in particular, in reasserting some of its fundamental powers in this general area. I am delighted to have you here.

STATEMENT OF HON. J. W. FULBRIGHT, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator Fulbright. Thank you, Mr. Chairman.

I am not at all sure that I qualify to speak with such authority from the constitutional point of view as you, Mr. Chairman.

If you mean that I suffer more from the recalcitrance of the executive branch agencies in ignoring the legislative branch, I will accept that as an accurate statement. I suspect my committee has been turned down on requests for information as much as any committee, unless it is your committee.

Senator ERVIN. I guess I am second to you in that respect.

Senator FULBRIGHT. Mr. Chairman and members, it is a privilege to be invited again to testify on a legislative proposal pending before the Senate Subcommittee on Separation of Powers of the Judiciary Committee. It is a special pleasure to have another opportunity to applaud the sagacity and the initiative displayed by the distinguished senior Senator from North Carolina, who is rightly acclaimed as the Senate's leading authority on the U.S. Constitution. The eminence he has achieved in that field, both through study and practice, assures us that the bill which he has introduced and which we are discussing today, S. 3475, derives from the strongest possible attachment to constitutional principles.

This assurance is particularly valuable because so many efforts have been made by the executive branch over recent years to depict the subject matter of the bill as falling into a constitutional grey area which should be governed almost exclusively by the mystical, if not mythical, quasi-constitutional "inherent powers" of the Presidency. In this regard, Mr. Chairman, this morning's news carries a story of an impending major, far-reaching commitment to Cambodia without any indication that congressional approval will be sought, other than the appropriation of funds to pay for it. This story only emphasizes the timeliness of this bill and of this hearing.

If the Senator would like, I have the article, that might be put in the record, someplace, to illuminate this issue.

Senator ERVIN. Put it in the record at this point.

Senator FULBRIGHT. It illustrates just today an example of what we are talking about.

(The article follows:)

[From the Washington Post, April 24, 1972]

U.S. TO HAVE CAMBODIA TIE AFTER VIET PULLOUT, HILL TOLD

(By Laurence Stern)

Administration witnesses have told the House Foreign Affairs Committee that the United States will have a defense commitment to Cambodia even after all U.S. troops are withdrawn from South Vietnam.

This position spelled out in testimony released yesterday by the committee suggests a broader scope of U.S. commitment to the survival of the present government in Phnom Penh than the administration previously articulated.

Until now the principal administration justifications for direct American intervention and aid in behalf of the Lon Nol government were first to safeguard the withdrawal of American troops from South Vietnam and most recently to help Cambodia maintain its "neutrality."

The newest enlargement of the rationale for aid to the Phnom Penh government was supplied last March 22 and 23 by Lt. General George M. Seignious II director of the U.S. Security Assistance Program and Assistant Secretary of State for East Asian Affairs Marshall Green.

"I think we may have a U.S. interest and policy reasons that would indicate that it was prudent and in our interest to continue some form of support to Cambodia after the U.S. forces have withdrawn from South Vietnam" Seignious said in reply to questioning by Rep. Donald M. Fraser (D-Minn.)

At the same time Seignious asserted that "we do not have any formal obligation or a commitment to Cambodia that I know of."

Green echoed this position. Assuming all American forces are out of South Vietnam he said "I still think we have an interest in the Cambodians being able to have a government of their own choosing that we could still be opposed to aggression succeeding and taking over Cambodia."

The administration's statements of its goals in Cambodia have been both ambiguous and somewhat ad hoc since the May, 1970, "incursions" by American and South Vietnamese troops.

On May 14, 1970, Secretary of State William I. Rogers said the defense of the Cambodian government is not "our primary purpose and that will not be our purpose in the future."

Since then the administration has begun programs of military and economic assistance to the Phnom Penh government which this year reached a level of \$341 million.

Green revealed in his testimony that the United States is now seeking to help build a Cambodian army force level of 220,000 in fiscal 1973. The current Cambodian force level envisioned in the military aid program is 200,000. Last year the United States was seeking to support a 150,000 Cambodian army. In 1970, when Prince Norodom Sihanouk was deposed by General Lon Nol, the Cambodian army numbered about 30,000.

It was disclosed during the executive session questioning of Seignious that the House Foreign Affairs Committee had prepared a draft report that was severely critical of the performance of the Cambodian military.

The report, compiled by two staff members who visited Cambodia last fall, asserts that the Cambodian high command is "poorly trained, luxury-loving and inadequate to the task of effectively fighting the North Vietnamese," according to Rep. Clement J. Zablocki (D-Wis.)

The report also disclosed that the United States was financing the construction of three training centers for Cambodian troops within Cambodia.

Rep. Wayne L. Hays (D-Ohio) informed Seignious that the report found that "a good part of the 200,000 army you are talking about is a phantom army, that they are not there."

Hays also questioned the planned delivery to Cambodia of C-119 transport planes. Speaking of assistance to the Lon Nol government, Hays added: "I don't know how they are going to use this stuff except as this report indicates, to buy Mercedes and television sets and what-have-you."

Senator FULBRIGHT. No one disputes the fact that the problem of the increased use of so-called executive agreements is a difficult one. Indeed, the State Department itself appears to have a hard time defining the term for its own purposes; it has virtually become a sorcerer's apprentice trying to keep the issue from getting out of hand.

All the more reason, then, it seems to me, to pursue the process of congressional definition, guidance and control which is at stake in the proposed legislation.

I believe my colleagues will agree this process in most recent times really began with the effort—notably encouraged by another great statesman from the South, the late Senator Richard Russell—to define the meaning of the term "national commitment". It took 2 years, but that effort culminated in June of 1969 with the overwhelming approval of Senate Resolution 85, the so-called national commitments resolution.

Although the gist of that resolution is well known, I believe it useful and relevant to our purposes here to read the exact text, as follows:

"Whereas accurate definition of the term 'national commitment' in recent years has become obscured: Now, therefore, be it

"Resolved, That (1) a national commitment for the purpose of this resolution means the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the

Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the U.S. Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment."

This language, it seems to me, clearly indicates the kind of subject matter which should be covered by a treaty, or, if not by a treaty, by specific legislation for the purpose. Certainly it does not leave room for unilateral action by the executive branch in the formulation and conclusion of significant international agreements, as if our legislature, our representative form of government and even our Constitution did not exist.

And yet the direction of events is going in quite another way, and at an increasing pace. The Senate is asked to convene solemnly to approve by a two-thirds vote a treaty to preserve cultural artifacts in a friendly neighboring country. At the same time, the Chief Executive is moving American military men and material around the globe like so many pawns in a chess game, and is spending enormous sums of money for bellicose purposes—all without any clear constitutional or legislative authority to do so, other than appropriations.

As recently as the middle of last month Senators were called to the Chamber to give their consent to ratification of the equivalent of a treaty action to increase the membership of the International Atomic Energy Agency Board from 25 to 34, or possibly, 35. The distinguished Senate majority leader virtually had to apologize for taking up his colleagues' time with such a minor issue, saying—and I quote from the Record of March 15th:

... if this is the type of treaty which is supposed to occupy the concern of the Committee on Foreign Relations and to call for a two-thirds vote for ratification, then I think there is something wrong with our system . . . I would hope that this kind of treaty could be executed on the basis of an executive agreement and that many of the executive agreements could be executed in forms of treaties. . .

Fortunately, owing largely to the praiseworthy initiative of the senior Senator from New Jersey, the Senate has taken some recent concrete steps toward congressional definition and control of the murky subject of executive agreements. The necessary historical background to the subject had been developed over several years through the Foreign Relations Committee action and report on Senate Resolution 85, through the Symington subcommittee's investigations and reports on U.S. security agreements had commitments abroad, and through numerous public hearings and speeches in the Senate. This body of material surely is very familiar to my colleagues—though regrettably perhaps not to the American public as a whole—and I need not repeat it here. But I would like to submit, as one specific example of that documentation about the erosion and evasion of legislative power, the following quotation from the committee report on Senate Resolution 85:

In some instances we have come close to reversing the traditional distinction between the treaty as the instrument of a major commitment and the executive agreement as the instrument of a minor one. In 1967, for example, the Senate considered and gave its approval to a tax treaty with Thailand. At no time, however, has a treaty or any other legislative instrumentality been put

before Congress with regard to the 50,000 American troops now in Thailand, many of whom are engaged in military support operations against insurgency.

With this example and the even worse Laotian situation in mind, in October of last year the Committee on Foreign Relations held an illuminating public hearing on Senator Case's bill, S. 596, relating to the transmittal of executive agreements to Congress. Testifying on that occasion were the Legal Adviser of the State Department, John Stevenson; the distinguished historian, Prof. Ruhl Bartlett of the Fletcher School of Law and Diplomacy at Tufts University; and the equally distinguished legal authority, Prof. Alexander Bickel of the Yale Law School.

In my opening remarks at the hearing I said:

Before undertaking to reexamine and then perhaps to reassert its proper constitutional authority in the area of the treaties, Congress must first ascertain that at least it knows of the existence and content of agreements contracted with foreign governments by the Executive.

This was certainly also the view expressed by the two academic experts, and the State Department witness said he at least did not disagree with the objective of the bill. After providing an excellent historical summary of the issues involved, Professor Bartlett stated:

In view of this perspective, it seems to me that this proposed measure is so limited in its scope, so inherently reasonable, so obviously needed, so mild and gentle in its demands, and so entirely unexceptionable that it should receive the unanimous approval of the Congress

The truth and wisdom of this observation were confirmed on February 16, 1972, when the U.S. Senate approved S. 596 by a vote of 81 to 0.

Now the curious fact is that Senator Case's bill was modeled upon a measure introduced 15 years ago by Senator Knowland with the full cooperation of the Eisenhower administration and then approved by the Senate. Yet the current administration felt compelled to oppose S. 596 and to ask that working arrangements be substituted for any legislation in this area. It was made quite obvious that the executive branch was entirely unwilling to make secret or sensitive agreements available to the appropriate congressional committees except on its own terms—although the euphemism employed was mutually acceptable practical arrangements.

It was pointed out by the State Department Legal Adviser that the procedure—known in the executive branch as the "Circular 175 Procedure"—for determining whether an international agreement should be a treaty was established in 1953. Further, the standards for determination adopted in 1964 by the Adviser's staff were again presented to the committee. These criteria, as will be shown later in these remarks, are so general and so suffused with references to the President's constitutional authority and power as to place the legislative branch at an immediate disadvantage in the process. Equally important, the executive branch clearly preferred to talk about notification rather than give any attention to the constitutional right and duty of the Congress to participate in the policymaking process. It is certainly no personal criticism of the distinguished Legal Adviser or his staff to suggest that their collective opinion was naturally that of a House Counsel. Neither is it any criticism of

them to note that the procedures and standards developed in 1953 and 1964, respectively, have not served the interests of the legislative branch or the Nation.

But, as Alice said in Wonderland, the story becomes "curiouser and curiouser." Remembering that the hearing on S. 596 took place in October, and noting that no committee action was taken until December 7, 1971, it is instructive to see how existing legislative-executive procedures operated in the interim period. For this sheds some light on the possibilities inherent in the concept of working arrangements.

During November a copy of a State Department memorandum of law was dropped off at the Foreign Relations Committee office, giving notification of a forthcoming naval base facilities agreement with Bahrain, as well as a finding under the "Circular 175 Procedure" that congressional action was not required. A bare minimum of factual information was included—although more ample and rather differently stated material was given the Armed Services Committee—and it was left to the committee to extract more data, especially with respect to the timing of the negotiations. The latter were concluded in an exchange of notes on December 23.

Mr. Chairman, in that connection, to illustrate the way the State Department describes this type of action, I think it would be interesting to put in the record a recent publication. It is called "GIST", issued by the Bureau of Public Affairs of the Department of State. This is No. 73, entitled "Treaties and Agreements: Azores and Bahrain Facilities."

It gives some feeling of the way executive officials describe these arrangements "Issues", as they call them, and I think it is a very one-sided—I call it distorted—view of what is involved.

In that connection, I think comparing it with the report of the Committee on Foreign Relations on the agreements with Portugal and Bahrain, gives some illustration of what I am talking about as further background, if that is agreeable to the committee.

(The document follows:)

GIST—A QUICK REFERENCE AID ON U.S. FOREIGN RELATIONS PRIMARILY FOR GOVERNMENT USE. NOT INTENDED AS A COMPREHENSIVE U.S. POLICY STATEMENT

TREATIES AND AGREEMENTS: AZORES AND BAHRAIN FACILITIES

1. *The issue:* Certain members of Congress have expressed concern about the authority of the Executive branch to enter into or extend foreign military base agreements without prior Congressional approval. Most recently this concern has centered on two Executive Agreements concluded by the U.S. for our use of facilities—in the Azores and Bahrain.

2. *Determining factors:* An international pact, depending on its content and significance, may be either a treaty, which requires Senate advice and consent to ratification, or an Executive Agreement not requiring Senate action. An Executive Agreement may be made:

- (1) with Congressional authorization under a statute or joint resolution;
- (2) under authority of a treaty previously approved by the Senate; or
- (3) under the President's authority as set forth in Article II of the Constitution.

In considering whether an agreement should be concluded as a treaty or as an Executive Agreement the Department of State takes into consideration whether: The agreement involves important commitments to be undertaken by the U.S.; the subject matter traditionally has been handled by treaty or Exec-

utive Agreement; it is desired to give great formality to the obligations undertaken; it falls solely within the President's constitutional authority or into an area of powers shared between the Congress and the President.

When the agreement falls in the area of shared powers, other factors to be considered include whether: Legislative authority exists for entering into the agreement; the agreement is to be self-executing—i.e., having the force of law without legislative action by the Congress; the agreement is intended to override state law.

3. *U.S. position: A. Azore agreement (December 1971).*

The military facilities in the Azores are important to U.S. national security. Our facilities there are uniquely suited for anti-submarine surveillance and are valuable for aircraft refueling and staging over the mid-Atlantic.

Agreements implementing treaties traditionally have been concluded by Executive Agreement. U.S. rights to station forces in the Azores were originally agreed to during World War II; they have been continued since 1951 under a series of agreements executed in implementation of the North Atlantic Treaty.

This renewal agreement contains no new defense commitment to Portugal. To cast the agreement in the form of a treaty requiring the Senate's consent to ratification might incorrectly imply that the agreement involves a new U.S. security commitment. The agreement on the Azores in no way alters our security commitment to Portugal under the North Atlantic Treaty.

The President has constitutional power to conclude agreements providing for facilities for our military personnel abroad. The Congress alone has the right to authorize and appropriate funds. Our assistance commitments to Portugal are made specifically within the limitations of applicable U.S. legislation and appropriations.

We are furnishing Portugal direct assistance in connection with the agreement as follows: Loan of an oceanographic vessel; \$1 million for Portugal's educational reform program; \$5 million worth of non-military excess equipment; PL 480 sales of surplus agricultural commodities up to \$15 million annually for the next two years. Export-Import Bank financing of development projects is available upon application to the Bank by the Government of Portugal. None of this assistance has any relationship to the Portuguese territories in Africa where our arms embargo continues fully in effect.

B. Bahrain Agreement (December 23, 1971).

A direct government-to-government agreement became necessary when the U.K. terminated its protective treaty relationship with Bahrain, which emerged as a fully independent state directly responsible for conducting its foreign relations. At the same time the British relinquished to the Government of Bahrain naval support facilities previously available to the U.S. Navy's small Middle East Force under informal arrangements with the U.K. on behalf of and with the approval of the Bahrain authorities.

The agreement provides in principle for continued use by our Navy a small portion of the former British facilities under leasing arrangements for logistic support requirements (warehousing, communications facilities, commercial pier, etc.). The agreement also defines the status of our Middle East Force personnel when ashore in Bahrain in such matters as jurisdiction, tax status, etc.

This agreement constitutes no political or military commitment to Bahrain or any other state in the area; nor does it involve a new U.S. policy or any change in the U.S. Navy's scope or mission there.

Withdrawal of our small naval contingent as the protective U.K. relationship ended might have been misinterpreted as an abandonment of U.S. interest in the Persian Gulf region, a major source of petroleum for the industrial nations.

Senator FULBRIGHT. Even the courtesy of notification in advance of the press being informed was denied the committee with respect to the December 9 signing of a \$436 million Azores base agreement with Portugal. And again the magical circular 175 procedure found that Congress need only be notified. While the State Department excused its haste on the flimsy grounds of President Nixon's Azores visit, there was no explanation why the committee was not consulted during the 2-year negotiating phase.

So much for "working arrangements." The plain fact is that the executive branch, unless placed under clear legislative restraints, always seems able to justify to itself any action it wishes to take abroad. Even when there are restraints, there appear to be teams of executive branch lawyers busily examining the fabric of constitutional precepts and precedents in order to find supposed loopholes. As exemplified by our legislative amendments regarding the wars in Southeast Asia, Members of Congress are placed in the demeaning position of so many Dutch boys putting their fingers in the dike only to find new holes popping open in every direction.

In response to the Azores and Bahrain *faits accomplis* Senator Case introduced Senate Resolution 214, requesting that the two executive agreements be submitted as treaties. My colleagues are aware that the resolution was approved by the Senate this March 3 last by a vote of 50 to 6. The sense of the Senate merely met with a polite letter of rejection from the Assistant Secretary of State for Congressional Relations. Now Senator Case has taken the only course of action possible in introducing a bill to cut off funds to implement either agreement.

Mr. Chairman, it is against this background—fragmentary as it is—that I welcome the opportunity to comment on your bill to "help restore the balance of power between the executive and legislative branches of the Government in the area of international agreements made with foreign nations on behalf of the United States."

First, let me say that S. 3475 represents a praiseworthy and logical second step in the nonpartisan process initiated by the distinguished senior Senator from New Jersey.

A second prefatory comment concerns my understanding that you have introduced this measure precisely to stimulate debate, that you are not wedded to each of its provisions, and that you will accept my criticisms of the text in the spirit in which they are intended.

My third introductory point relates to my reluctance to submit at this juncture proposed substitute language in anything more than a preliminary and tentative form. Since the bill, under the unanimous-consent ruling of April 11, will be referred to the Committee on Foreign Relations, as chairman I would prefer to retain as much latitude as possible in my position in order to facilitate the process of considering S. 3475 in committee. Moreover, I believe the formidable array of legal talent in your subcommittee and its parent body is far more capable than I of finding precise legislative formulations for the ideas offered at these hearings.

Senator ERVIN. If I may interject myself at this point, I would say your analysis of the purposes of the bill are indeed correct. It is my idea this committee, which has had much experience in the study of the separation of powers of the three departments of Government, would look at this bill and make our suggestions about improvements in it. Under the Senate agreement, the bill, after this committee finishes its study, will be referred to the Foreign Relations Committee, because I consider this subcommittee and the Foreign Relations, both, to have a peculiar interest in this bill.

Thus far, I think the two committees have manifested a kindred feeling about the advisability of reasserting the constitutional powers of the legislative branch of the Government in this general area.

Senator FULBRIGHT. I thank the Senator for those comments and I certainly agree with him. As I said before, I, certainly, and I know the whole committee welcomes the Senator's efforts in this respect. I am sure we could not succeed without his assistance.

Having said that, Mr. Chairman, I must admit very serious reservations about the concept in section 1(b) of the bill that any executive agreement would come into force with respect to the United States unless both Houses of the Congress within a 60-day period pass a concurrent resolution disapproving the agreement. The House of Representatives, at least until very recent days, appears to have maintained a distinctly different view of international affairs than that held by the Senate. This has been true in varying degrees with respect to such vital questions as the Indochina war, foreign assistance, multinational institutions, relations with communist countries, and the use of military force in general. I am not insisting that the Senate position is always correct; nor am I stressing the primacy of this Chamber in the foreign policy field. However, I do believe that this provision could be a prescription for a stalemate which would permit virtually every executive agreement to receive the tacit approval of the Congress. This result would, in my opinion, amount to a subversion of article II, section 2 of the Constitution.

Rather than leave this provision unchanged, I would recommend the exact reversal of its substance, so that a concurrent resolution would be required for approval of each agreement. However, I recall the testimony of the State Department legal adviser that the United States each year enters into roughly 299 new international agreements other than treaties. Doubtless a number of these are of trivial importance. Furthermore, I suspect few of us would want to pass a resolution for each Public Law 480 arrangement or each educational exchange agreement.

As a compromise between these two positions, therefore, I suggest amending section 1(b) to make it possible for either body, through a Senate or House resolution, to state in substance that it does not approve the executive agreement. The prohibition against the agreement coming into force would remain unchanged in that section. But section 3 would have to be recast in order to accommodate the substitution of a unicameral resolution for a current one. In this connection, I would give some thought to a strict requirement that a record vote take place on each such resolution.

The root of my problem with S. 3475 as drafted nevertheless goes to the language of section 2 containing the definition of the term "executive agreement." It is my view that this definition is entirely too broad; indeed, so broad that the executive branch would be encouraged to employ the device with increasing frequency and to cast the significance of treaties and international conventions further into the shadows. Even with the change regarding the nature of a resolution suggested above, if the definition in S. 3475 is left intact, the executive branch would still gravitate toward expanded use of the agreement technique. For a resolution prohibiting enforcement could be rejected by a simple majority, whereas a treaty requires a positive two thirds vote of the Senators present.

At this point we come squarely up against the challenge to substitute a different definition from that contained in S. 3475. As I sug-

gested earlier in this statement, Senate Resolution 85, the national commitments resolution, approved on June 25, 1969, appears to me to be one essential ingredient in the equation. Another source of appropriate language might well be an adaptation of the Department of State 1964 standards for its circular 175 procedures, which provide:

... that the executive agreement form is used only for agreements which fall into one or more of the following categories:

(a) Agreements which are made pursuant to or in accordance with existing legislation or a treaty;

(b) Agreements which are made subject to Congressional approval or implementations; or

(c) Agreements which are made under and in accordance with the President's constitutional power.

Thus I might suggest a tentative formula reading along the following lines:

For the purposes of this Act, the term 'executive agreement' means a bilateral or multilateral international agreement other than a treaty—excluding diplomatic notes and administrative arrangements which do not bind the Congress to take specific actions—made pursuant to or in accordance with existing legislation or a treaty. However, an "Executive agreement" cannot of itself constitute a "national commitment", which means the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government or people by the use of the Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events, and which results only from affirmative action taken by the Executive and Legislative Branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment. Nothing in this definition shall be construed as diminishing the requirement that a highly significant international agreement be negotiated in the form of a treaty, or as decreasing the categories of agreements which are made subject to congressional approval.

Reasonable men may differ on occasion about what constitutes an important international agreement. On the other hand, just a little less than 2 years ago we had a confrontation between the Senate and the executive branch over the issue of the Spanish base agreement—which by any stretch of the imagination one could not describe as anything but a highly significant international agreement. The arguments of the executive branch were that since the original 1953 agreement was not a treaty, and since there was no clear undertaking by the United States to defend Spain, the executive agreement form should again be employed. In my rejoinder, I pointed out that one could describe the direct and indirect costs of the Spanish agreement as near \$400 million over 5 years. I also stressed the notable statement of November 1968, by the then Chairman of the Joint Chiefs of Staff, Gen. Earle G. Wheeler, who said:

By the presence of the United States forces in Spain the United States gives Spain a far more visible and credible security guarantee than any written document.

That, Mr. Chairman, if I may interject, is one of the major reasons why the Foreign Relations Committee really became exercised about this use of executive agreements. The truth of the matter is many of us were not aware, and had never been made aware, of the full terms of the preceding agreement.

Our suggestion that there be public discussion of the proposed Spanish agreement—if not specific Senate approval in terms of a

treaty—merely stimulated the executive branch to conclude the executive agreement with what could only be regarded as unseemly haste. As a result, the distinguished senior Senator from Idaho, Mr. Church, introduced Senate Resolution 469, which declared that the executive agreement represented no national commitment to Spain of any kind. This was approved both by the Foreign Relations Committee and by the Senate as a whole with overwhelming support. The episode clearly showed the urgent need for greater executive branch cooperation, and the difficulties of operating our constitutional system in the absence of such cooperation.

I say that because, in spite of the passage of that resolution, the statement of General Wheeler, as a very practical matter still remains, I think, indicative of a prevalent executive attitude.

Descending abruptly from this high level of substantive generalization, I have a further suggestion for a technical change in the last sentence of section 1(a) of the bill. My proposal would have the sentence, with deleted material within brackets and new words underlined, read as follows:

Each committee shall personally notify the members of its House that the Secretary has transmitted such an agreement with an injunction of secrecy, and such agreement shall thereafter be available for inspection by such members only in the offices of the Committees.

This very minor change is in keeping with our prevailing tested and successful regulations for handling classified information.

I have one additional thought about S. 3475 which I would prefer to present in the form of an idea, rather than as a suggested amendment. It concerns the lending operations of the Export-Import Bank, which have recently been taken out of the budget and which receive congressional scrutiny only well after the fact. As evidenced by the Azores agreement—in which Export-Import Bank credits of up to \$400 million are provided for—the executive branch is apparently using the Bank for purposes which have broad foreign policy implications.

May I interject there to say my concept of the original purpose of the Export-Import Bank was not in this broad foreign policy field, although it certainly could affect it, but it was to promote the export of manufactured articles and other goods and all articles of this United States, in order to improve our balance of trade. The Bank was never anticipated to be used as a prime tool for shaping the direction of foreign policy, especially as in the case involving military bases, et cetera.

Indeed, through the use of the Bank, OPIC, and other instruments, the administration can conduct a very sizable foreign aid program without going through the usual foreign assistance authorization and appropriations process. The Bank, in particular, which receives funds through the Treasury by what is commonly referred to as “back-door financing,” is really almost exempt from congressional control. Perhaps this is what a majority of members want, but I doubt such a proposition. We might, therefore, give consideration to a requirement that any Export-Import Bank loan or credit, or any series of loans in one fiscal year, relative to any individual foreign country amounting to more than a clearly reasonable total should be submitted in the form of an executive agreement subject to the terms of S. 3475.

Mr. Chairman, let me say again how much we value your leadership and judgment in this area. I believe you are doing us all a service by focusing attention and debate on a vital constitutional problem neglected for all too long a period. In this connection, I would like to quote a very pertinent observation made during the hearings on S. 596 by another great authority on our Constitution, Professor Alexander Bickel:

Executive agreements which lie in the "zone of twilight" between Presidential and legislative powers are of obvious concern and legitimate interest to Congress in the exercise of the function assigned to it by the Constitution. For the "zone of twilight" may be occupied by Congress at will; that is the significance of it. It exists, and independent Presidential power can exist within it, only by Congress' leave, or because of the inertia of Congress. It is redefined or it vanishes whenever Congress chooses to act. What Congress may act on, it can require to be informed about.

In conclusion, Mr. Chairman, having such deep respect for the Constitution, I think that a "national commitment" involving the use of the Armed Forces on foreign territory should be created by the treaty process, as required by the Constitution in article II, section 2:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.

National commitments of lesser solemnity and risk involving only substantial material resources of our country may be approved by statute or Concurrent Resolution of the Congress. Relatively insignificant matters of an administrative or routine character may properly be made by executive agreements. A clear-cut, unquestionable distinction between significant and insignificant matters would be difficult to legislate precisely. The principle that matters of great importance to the life of the Nation should be dealt with only by treaty can be applied in specific factual situations only by reason and common sense.

Thank you very much, Mr. Chairman, for hearing me.

Senator ERVIN. I take it, Senator, that you consider that the power of foreign relations is a shared power; that is, a power which is shared between the President and the legislative branch of the Government, and the Senate in particular?

Senator FULBRIGHT. Indeed, I do.

Senator ERVIN. Certainly, a shared power requires the cooperation of all who share it in order to exert that power in the best interest of the Nation.

Senator FULBRIGHT. I agree, Mr. Chairman. You state it very well. You properly say "cooperation." In this field it seems to me what we are trying to do is not coerce anybody, we are trying to persuade the Executive for the good of the Nation that we must have cooperation.

That is why we ran into great difficulty, as I tried to explain. The statement of the principle is fairly easy to do, but to draw the line precisely is extremely difficult. You have to rely upon mutual respect between the executive and the legislative branches and application of common sense in making these distinctions. And what I think has been happening, they have been reversing the traditional process that I believe the Founding Fathers had in mind.

In article II, section 2, they meant important matters. They did not mean every trivial little thing that came along. They had in mind, obviously, important matters that involved what I think the "national commitments resolution" covered.

Senator ERVIN. Certainly the treaty-making power by its very constitutional terms implies that there must be an agreement on the part of both the Executive and the Senate to make a treaty.

Senator FULBRIGHT. That is right.

Senator ERVIN. And it is impossible to ever get a treaty without the entire cooperation on both sides.

Senator FULBRIGHT. That is correct.

Senator ERVIN. Perhaps that is the reason. It explains why the Executive is so desirous of making treaties through a process in which they can ignore the Senate.

Senator FULBRIGHT. That is correct.

Senator ERVIN. It seems to me that article II, section 2, clearly contemplates that any agreement of any considerable substance between the United States and any foreign nation is to be cast in the form of a treaty first negotiated by the President and then submitted by the President to the Senate for ratification or rejection.

Senator FULBRIGHT. That is correct.

Senator ERVIN. The Constitution, itself, does not mention executive agreements, but the Constitution does provide that treaties shall be the supreme law of the land, along with acts of Congress, and it especially provides the most important duty of the President is to see that the laws are faithfully executed.

Senator FULBRIGHT. That is correct.

Senator ERVIN. I think we can all agree that executive agreements, when they are properly restricted to useful functions, are helpful tools which enable the President to execute laws which are either in the form of treaties or in the form of Acts of Congress. That is about the extent to which they can be rightfully or constitutionally applied.

Senator FULBRIGHT. I think you state it very well. There has to be the use of some common sense in drawing the distinction between matters of consequence and importance, and trivial matters. Certainly, it need not be every trivial agreement or administrative arrangement.

The Constitution gives the President the power to receive ambassadors. He does not have to have approval to receive the ambassador from country X. Of course, in a sense, that is an executive agreement. It is implicit in that type of operation. In that sense, by a tacit deduction from our powers, you get some limited recognition of executive agreements, I think, although not specifically called that.

However, not only from the Constitution, but clearly from the background of the discussions in the Constitutional Convention, of the war powers in particular and of the nature of the power of the legislature versus the President, it was obvious when it came to using our troops and committing the country to a war with a foreign country, which is involved in many of these troop arrangements, the Founding Fathers clearly thought that was a matter of the highest importance and the Congress should play a part.

This bill is not unrelated to the war powers—the power of the Congress—and the significance of that is very clear in the constitutional debates, the discussions on this subject.

Senator ERVIN. The more I study the Constitution, the more I am beguiled by the magnificence of the document on the war powers.

It seems to me the Constitution makes a clear distinction between what might be called an offensive war and what might be called a defensive war. The division of the Constitution, giving the President power to initiate war, is directed to a defensive war, because under the Constitution, article IV, section 4, and the last clause of the article I, clearly contemplates that there is a duty to repel an invasion by another country. In any other kind of a war, the President really has no right to initiate it without the consent of Congress.

Of course, this all goes into so many of these executive agreements which are made in connection with the carrying on of war.

Senator FULBRIGHT. Creating conditions that lead to war. The Spanish ones, especially the very words of the former chairman of the Joint Chiefs, create a situation that exposes us to war by an executive agreement. Not only that, a secret one, secret at least at the time it was signed. Absolutely no effort at consultation. Even the existence of the terms of that agreement was found, really, by a very resourceful newspaper reporter. The executive branch goes to great lengths to keep the Congress and keep the Committee on Foreign Relations from knowing what is going on, in many instances.

Senator ERVIN. We hear a great deal lately about the inherent power of the President. We heard, for example—it is not in the field we are discussing—that the President has an inherent power to engage in electronic surveillance of citizens suspected of what they call, by loose term, “domestic surveillance,” and the President has the power to set aside the requirements of the fourth amendment. I found myself unable to accept that concept.

The powers of the Presidency, as claimed by the executive branch, are constantly expanded. Personally I think that one of the main purposes of the Constitution of the United States, was to deny any branch of the Government—legislative, the judicial, or the executive—from being able to claim it has any inherent powers.

In other words, I think all of the powers any branch of the Government has are either expressly stated in the Constitution or are implied from the powers expressly stated. Otherwise, there would be no use to write a Constitution if the executive branch could reach up in its imagination and pluck out powers that are not even mentioned in the Constitution.

Senator FULBRIGHT. I fully agree with the Senator. I think what has contributed to this growth more than anything else has been the long engagement in warfare and crises since World War II. There has been a decided change, it seems to me, in the attitude of the executive branch, beginning during what we call the Cold War immediately after World War II. There has been a gradual enlargement. It feeds on itself.

An executive branch official makes a statement—the Secretary of State, or the Attorney General—and the next one comes along and uses it as a precedent for the next one, and the next one, and it has proceeded thus during the last 25 years.

Senator ERVIN. You and I have both heard Secretaries of State of both political parties appear before congressional committees and claim that the country had committed itself to a course of action in respect to some foreign country, either by a statement somebody made orally, or by a letter that had been written.

The "National Commitments Resolution," which you offered, I think correctly described what should be a national commitment, and it certainly defines a national commitment as something that would be entirely in harmony with our constitutional system of government, instead of repugnant to it.

I want to thank you for your very fine statement and for the suggestions you make about some changes in the substance and the phraseology of this bill. This bill is a blueprint for discussion. It is a very difficult field to legislate in, to get exactly the right expressions, and the suggestions you have made are very thoughtful and certainly are worthy of our consideration.

Senator FULBRIGHT. Thank you very much.

Could I make one comment on Mr. Clifford's statement this morning? He is a very able lawyer and I read his statement with great interest. I certainly in no way would like to denigrate it in any way. I only want to make a comment.

I do not think what I have to say is contrary to what he said, but there was one paragraph in his statement that I just want to raise a question about because he is a man of great prestige, and, rightfully so, having been in effect a board member of the executive and also a great lawyer.

I would like to make a point about his paragraph which reads as follows:

Is there any difference, then, between a treaty and Executive agreement? My answer is in legal force and effect, a properly concluded Executive agreement supported where necessary with implementing legislation is tantamount to a treaty.

While this statement standing alone, and as he says, in legal force and effect, may be accurate, I fear that those advocates of unrestricted Presidential power may seize upon it to justify a further perpetuation of the exclusion of Congress from the decisionmaking process in this field.

Is it wise; is it within the spirit or the letter of the Constitution that a commitment of our Nation's manpower, resources and on behalf of another nation's security, should be made without the commitment being approved by two-thirds of the Senate of the United States?

If one grants the validity of this statement, restricted as it is, there remains a very difficult question:

It is my view—this is a little repetitious—that such a solemn and far-reaching exercise of power is not according to the intents and purposes of the men who created our constitutional system of government. I believe they would be appalled by the proposal. An agreement made solely by the President, with a foreign nation, probably in secret, committing our country to defend a foreign nation with our troops, should be considered consistent with the Constitution which they adopted.

Senator ERVIN. I share your views. To my mind it is inconceivable that the Founding Fathers would have taken the trouble to spell

out in article II, section 2, exactly how a treaty should be made—to require that it be submitted to the Senate for ratification or rejection, and to require two-thirds of the Senate to vote favorably before it would become effective—and at the same time to have an inherent power in a President, one man, to make an agreement with a foreign nation without any formality and not consulting with anybody but himself.

Senator FULBRIGHT. That is right. Of course, I agree with you. I hesitate to say this because, strictly speaking, what was stated applies to some situations. What Mr. Clifford said, of course, was true, and I would have no objection to it. But, standing alone, I could see the next Secretary of State going back and saying, "Well, this was said in the hearings," and so on, "it was tantamount to a treaty."

The same kind of language—I am reminded—that former Attorney General Katzenbach used before the Foreign Relations Committee some years ago. I wanted to clarify this point.

Senator ERVIN. I am glad you did because his statement was very much qualified by his expression, "when it is legislatively implemented."

Senator FULBRIGHT. That is right.

Senator ERVIN. If you take that expression out of his statement, it has quite a different meaning.

Senator FULBRIGHT. I have had it happen to me so often. The qualification is just taken out and the one sentence is cited, and that is what they say Mr. Clifford said. I think if you read his whole statement, it is clear what he meant.

Senator ERVIN. I share your admiration for Mr. Clark Clifford, for his great services to the country, and his great ability as a lawyer, but I did take issue with the unlimited meaning he attached to the term "Executive." I said, of course, the Constitution says the President is the Executive Officer of the United States, but it takes and spells out in article III what the Executive Officer of the United States is allowed to do. It does not leave it solely to his judgment or some kind of unwritten law or some kind of inherent power, in my judgment.

Professor Miller would like to ask you some questions.

Professor MILLER. Sir, I have just one question, if I might. I think the subcommittee, and I am sure your committee is often faced with the proposition, that when you interfere with the Executive in the way that this bill purports to do, you unduly hamper the conduct of foreign affairs in this age of nuclear warfare with the need for speed and flexibility, and so on.

I think it would be helpful to get your comments on whether this bill would be undue interference with the Executive.

Senator FULBRIGHT. Well, Mr. Miller, I confess, maybe I am biased, but I think maybe some of the decisions that have been made have been taken with undue haste and minimum consideration. And it seems to me the Constitution was intended, as the chairman said, to prevent that.

The ongoing process of excluding the legislation from participation in decisionmaking in this field is, I think, the root of the evil, assuming, as I believe, we all do believe in our constitutional system.

What has happened is that in these most serious decisions involving warfare by our country, which I feel is the fundamental reason we are in such difficulty today, the Congress has effectively been excluded.

I do not want to excuse the Congress for being a participant in this process, because we have been very negligent in many cases and I confess I certainly have. I did not recognize at the early stage what was going on. This has been a gradual process. Executive officials were usually confronting us with a so-called crisis and we did not recognize just how far it was going.

In a sense that is exactly what we want to do: To hamper the Executive from employing improvident and unexplained and undigested ideas, if it would result in the commitment of our country to these disastrous adventures.

So, in that sense I accept the idea it is intended to do that. I believe there is great merit in public discussion of these issues. Public in terms of discussion in the Congress. Being a country of 200 million people, we cannot have a town meeting. The major vehicle for such discussion is the Congress, and then the commentators and the press growing out of those debates. And this is essential, it seems to me, if we are to avoid, insofar as possible, making serious mistakes.

Where the mistakes are made, in my opinion, is in the making of grave decisions without adequate adversary discussion of the issues involved.

At times the Chief Executive may be right, of course, but it would take an inspired genius always to be right acting alone, with just one or two men thinking about it in the recesses of Camp David or the White House.

George Reedy discusses this process very well. He says it is not only that there is no public discussion—there is no discussion in the Congress. He lived there in the White House for a number of years and he said also that there is no real adversary discussion within the executive branch because no one dares take issue with the President.

And I think he says it correctly. The President, isolated as he is, is not even given the advantage of an adversary discussion, even among his own colleagues—because none is his peer, none has a political base—so they all contrive to find reasons to agree with the President's point of view.

So the whole process of decisionmaking is insulated from serious discussion by different minds. And the whole value, it seems to me, of our constitutional system is the exposure of important issues to adversary discussion, the play of 535 minds plus, of course, the experts outside, such as yourself and others who are connected with or interested in the legislative process.

So I think that is the weakest of all arguments against this bill. If this bill will promote a further consideration and discussion of these important decisions, that is just great.

Professor MILLER. Thank you, sir.

Senator ERVIN. The truth of it is, the Constitution was written to interfere with all branches of the Government to a certain extent.

Senator FULBRIGHT. The purpose was to prevent arbitrary rapid decision taken by any President, just as the Founding Fathers had

in mind, of course, their own experiences preceding the Constitution with the King of England. But that is its very purpose and this is one step in that direction.

Professor MILLER. Thank you.

Senator ERVIN. Thank you very much. You made a very significant contribution to our study.

Senator FULBRIGHT. Thank you, Mr. Chairman.

Mr. EDMISTEN. Mr. Chairman, the next witness is Dr. Elbert M. Byrd, Jr., who has written extensively on this subject. He is the author of "Treaties and Executive Agreements in the United States: Their Separate Roles and Limitations."

Senator ERVIN. Dr. Byrd, I want to welcome you to the committee and express our deep appreciation for your willingness to appear and give us the benefit of your views in the field in which you have done much study.

STATEMENT OF DR. ROBERT M. BYRD, JR., AUTHOR OF TREATIES AND EXECUTIVES AGREEMENTS, THEIR SEPARATE ROLES AND LIMITATIONS

Dr. BYRD. Mr. Chairman, it is with pleasure conditioned by an appreciation of the great importance of the problem with which you are dealing that I appear before you this afternoon. Your problem is not a new one; it has been with us since the beginning of the Republic; and it has always involved the question of whether or not a truly representative form of government can be maintained. But the problem becomes more intense in what we may call the space age, a time in which the earth seems to be belittled, a time in which our solar system seems, in terms of time and space, not nearly as large as the earth alone appeared to be only a short time ago.

In your invitation to me to appear before you, reference was made to my work on "Treaties and Executive Agreements, Their Separate Roles and Limitations." To make my situation clear, let me say that I gave specific and sustained attention to the subject for almost 10 years prior to publishing that work in 1960, but since that time I have given only general attention to the subject. You may wish to refer, however, to an article of mine in the March-April 1961 edition of the Northwestern University Law Review entitled "Constitutional Limits on International Agreements in the Space Age."

In my book on "Treaties and Executive Agreements," I pointed out that, contrary to popular opinion, there are at least 13 clauses of the Constitution dealing affirmatively with the conduct of foreign affairs, and at least 21 provisions of a negative or limiting nature which touch directly on foreign affairs. Read in their own verbatim context, all these provisions produce a mass of confusion. Only after in-depth probing into the situation which produced and ratified the Constitution does the researcher begin to grasp the perimeters of the problem and the reasons for the language used.

Perhaps I shall put it too simply, but I shall do so in the interests of time limitations. This country was made up of 13 separately independent and sovereign States. They had great problems, individually and collectively. They wished to unite to ameliorate their collective

problems but also to retain a large measure of individual autonomy. In matters respecting subjects close to the local community, they would rather that the new Union—or Federal—Government be not involved at all, but since they could find no way to distinguish definitively between domestic and international subjects, they left the question open, but provided that in the event that subjects of proposed treaties should touch upon traditionally local matters, those treaties would have to have the approval of two-thirds of the Senators in order to become effective. Just as examples: Treaties approved by two-thirds of the Senators could control inheritance of land, or transfer of land between aliens, or trial of aliens by their nation's consulates on American soil, or eligibility for marriage in contravention of State laws, all subjects which were certainly not delegated to the Federal Government to act upon by passage of statutes by the Congress.

Congress as such, however, was given many powers to deal with foreign affairs, to include the regulation of commerce with foreign nations. Commercial treaties were not prohibited for Senate action alone, but the House of Representatives was specifically provided with power to deal with the problem. Just as important then, and more important now, the House of Representatives was given preference in taxation matters over the Senate and at least equal power in appropriations. Thus, you are not only faced with the problem of separation of powers between the Executive and the Congress, but what we might call a division of powers between the Senate and the House.

Extensive powers in foreign affairs were provided for the President. He was given plenary power to recognize or refuse to recognize foreign governments. He was made Commander in Chief of the military forces in existence; and he was given the completely unexplained "Executive power" of the United States. The President was unsaddled with many problems of a quorum, as the Congress has, and he is "in session" 24 hours of every day.

By implication, the Constitution assumes a state of good will and devotion to duty by the President, by the Senate and by the House—although recognizing the existence of diverse opinion and judgment within this perimeter. It is perhaps axiomatic that separation of powers can produce deadlock if each branch has the determined objective of checking the other branches. I have always felt and taught that it was the rise of political parties which tended to ameliorate the possibility of total negativism which is theoretically possible by checks and balances of the separation of powers system.

I do believe, however, that in the recent era, and especially during and since World War II, the initiative and predominance, especially in foreign affairs, has shifted more to the executive branch than in any time in our prior history. A very important reason for this, of course, is the nature of the times—the instantaneous communications, the existence of pushbutton war potential, the unprecedented threat of nuclear war, all summed up by the phrase The Space Age Era,—all these new developments are most important in the change of emphasis of the power exercising locus.

It is true that the President is concerned continually with all the various problems facing the Nation, both domestic and international.

But he has hundreds of staff personnel who devote all of their time to foreign affairs alone. No single Senator or Representative has a staff concerned only with foreign affairs. Perhaps one employee is assigned principally to foreign affairs, but the member of Congress may have occasion to switch him to other tasks as the need arises.

Furthermore, the complexity of foreign affairs in the Space Age Era has, in my opinion, tended to cast a pall over members of Congress, causing them more often than in former times to adopt a mental attitude of acceptance of the pronouncements of the experts in the executive branch, and to go along with what is handed them as the patriotic policy of the time. I'm not sure this is escapable as it relates to nuclear policy, but the psychological differentiation between the threat of nuclear war and the possibility of ordinary conventional war is not easily made within such an atmosphere, and, thus, the inattention to foreign affairs may include inattention to involvement in conventional warfare of an alleged brushfire sort before it is too late to discern the error of the inattention and the error of the experts.

Now it appears to me that when a considerable portion of the country, reflected in a considerable portion of the Congress, discerns that errors have been made by the experts during the normal inattentive atmosphere—that a search is begun for some sort of mechanism which will automatically prevent similar errors from happening again. I stress automatically because I believe that the Bricker Amendment period was partially, not wholly, a search for automatic devices to prevent our making errors in foreign affairs. And, with utmost respect for the fine purposes underlying recent proposals of bills and resolutions, I believe they also are partially, not wholly, motivated by this urge for automatic devices—automatic devices by which, for example, the executive branch is so much as directed to alert the Congress about a move or possible move which might displease the Congress.

I might say that I evaluate S. 596—let me interject here to say I had before me when I prepared my statement a copy of S. 596, but did not have your resolution so I could not have that officially in my statement—I might say that I evaluate S. 596, recently approved by the Foreign Relations Committee, and now approved by the Senate, in the manner I have just described. It says the text of any—and I assume this means all—international agreements other than treaties shall be transmitted to Congress within 60 days after going into effect. Upon first blush, it sounds pretty good—an automatic device by which the Congress will be informed of all agreements made with all other countries, and providing a means, therefore, of having notice given of agreements which might displease the Congress or an important portion thereof. But S. 596 itself provides for exceptions—for those agreements which the President feels should not be so transmitted. They, the bill provides, shall be transmitted only to the Foreign Relations Committee of the Senate and Foreign Affairs Committee of the House under an injunction of secrecy. This provision is, in my judgment, unenforceable because of the doctrine of executive privilege which can be invoked by the Secretary of State.

Beyond this, however, the bill—S. 596—directs what is essentially impossible to achieve. I mean by this that it contains no definition of

international agreement other than treaty. It makes no differentiation between written and oral agreements. It makes no distinction between either written or oral agreements contracted at the highest or lowest level of delegated authority. In a realistic sense, perhaps, however, to the Foreign Relations Committee in an unimportant sense, it directs the Secretary of State to perform what he cannot possibly do.

Beyond these technical aspects, however, I refer to the same theme: The search for automatic devices, whether of constitutional amendment or statutory approach, are unlikely, in my judgment, to be productive.

What, then, might be more productive? Before I try to answer my own question, let me make these observations:

(1) The President is, after all, the architect, the overseer, the day-to-day conductor of foreign affairs—capable, under constitutional authority, of instant action without concern for a quorum and in session continuously. Whether we agree or disagree with the President on day-to-day conduct of foreign affairs, we are, in so many words, stuck with him for 4 years or so. This relatively short term is, however, a limitation upon him. Even his super-secret agreements, unknown to Congress, either expire with his own term of office or are subject to reevaluation by his successor.

(2) The Congress cannot and does not desire to perform this foreign relations role of the President.

(3) Even if agreements or other proposed actions in foreign affairs are totally and faithfully and automatically referred to the Congress, this does not mean that errors will be avoided. I believe the history of the Tonkin resolution is an important example of this fact. For one thing, the expressed importance of the event and the expressed urgency of the matter are likely to elicit approval, especially when the proposal is backed by convincing information available to and as interpreted by the executive branch. In sum, the Congress, acting upon the instant, is within the reasonable bounds presented at the time, just about forced or convinced that there is little or no alternative to going along with the President at the moment.

But what the President recommends is, psychologically, heavily conditioned by his expectations as to how long the Congress will go along. If there is a current tradition that members of the Congress will continue to vote appropriations for an involvement even though they have grown to disapprove of it, then the President will be less inhibited to enter into new ventures than he would be if Congress acted otherwise.

So this leads me to the matter of what might be more productive than the search for automatic devices. The power of the purse is in the Congress. Virtually everything that affects foreign affairs importantly comes back, in one way or another, to depend on appropriations to carry it into effect. When a foreign affairs endeavor has gone sour, or when new information convinces the Congress that a mistake has been made, Congress has the power to put a stop to the continuation of those errors. A fundamental attitude in this direction will do much, in my opinion, not only to alert the executive branch to greater caution, but will imbue Congress with a greater

sense of its own power, its own accountability and its own sense of responsibility.

As I have studied and taught American Government, I have considered checks and balances as the other side of the coin of separation of powers. I have not understood this to mean that one branch checks another by telling it what to do or not to do, but that one branch checks another by its own action. For a long time now, at least in foreign affairs, the executive branch has emphasized action while the Congress has tended to talk. When the Congress acts more energetically, there will be more checking of the Executive.

I think some minor reorganization in Congress might help a bit, although I do not wish to overemphasize this. In general, I believe organization follows will and attitude and does not dictate them. The will and attitude of Congress to reemphasize action under its part of the separation of powers might well bring about subcommittees of Foreign Affairs and Appropriations with the members of Congress and the subcommittee staffs who will more vigilantly ride herd on foreign affairs and who will not hesitate to recommend real action to check foreign affairs developments even though it is not their function to begin foreign affairs developments.

I believe I will end my statement this afternoon by quoting the final paragraph of my article previously mentioned which appeared in the Northwestern University Law Review of March-April 1961. It went like this:

If the citizens of the United States fail to flourish or survive in the Space Age, it will be the forces of technology or lack of wisdom, a strong enemy or moral degradation, mis-directed energy or just misfortune, or a combination of all these which will be responsible. The Constitution will be blameless.

Thank you, Mr. Chairman.

Senator ERVIN. Dr. Byrd, if I construe your statement right I take it that you think that Congress has got to depend on the power of the purse to control Presidential action in this field, ultimately.

Dr. BYRD. When you come right down, after having considered all of the other devices which may do some good work, as I said, psychologically they would help but the final deterrent is going to be, in my opinion, appropriations. The others are not going to work very effectively. They have not in the past.

Senator ERVIN. That leaves us in a despondent position, does it not, that we have to wait until the horse is stolen until we can lock the door?

Dr. BYRD. I would not put it that way, because the horse is stolen a little bit at a time rather than the whole horse. So, maybe the front part of the horse has gone, but you can stop the rest from going.

Senator ERVIN. Now, the fundamental trouble with that, as I see it, is that Congress is rendered rather helpless. You take, for example, that I probably would have been rated among the "hawks" in respect to the Vietnam war, though I think that we ought never to have gotten in there in the first place. I took the position that the Gulf of Tonkin resolution authorized the present use of the Armed Forces to combat aggression in that area, and that any authorization from Congress for the President's use of Armed Forces in combat is tantamount to the declaration of war.

So I did not argue that part, I was not too concerned.

I know some of my constituents came up and said, "You ought to put an end to the Vietnam war," and I said:

Please tell me how to do it, I am not Commander-in-Chief of the Armed Forces, and if I issue an order to immediately leave Vietnam and stop fighting, the military would pay no attention to it.

They said, "Well, you can vote to cut off appropriations." I said:

No, I can't do that, either, because if we cut off appropriations, the boys over there that have been sent there, in many cases without their consent, would not have any weapons to fight with, they would not have any munitions to fight with, they would not have any provision to take care of the wounded in hospitals, and I just cannot do that.

And that is the fix that the President can get Congress into where we must to a certain extent, go along whether we want to or not.

Dr. BYRD. Senator, I would not think of it quite as either/or as all of that.

You would have advance notice to the President. For example, this year's appropriation bill, the money is already existing which he has expended, for example, in Vietnam. Your appropriation bill effective as of July 1, next fiscal year, or for that matter, effective October 1 or December 1, "There shall be no more appropriations for the Vietnam war." I am using this theoretically.

Then the monkey is on the President's back. He still has time to get them out and have all of the material for the hospitals and everything else really needed for the boys. But he knows there comes a time when he will not have it. The responsibility is his, very clearly, as taken by the Congress Appropriations Act, to take that interval to spend the money already existing to pull out.

He will know, by the law and appropriation, he will not have money after that date.

Senator ERVIN. Suppose that date comes, and the President does not pull them out. Then what?

Dr. BYRD. I think public opinion in the country has bearing on this. And if the record is clear, as I have indicated, that the Congress has given plenty of notice to the President what would happen in the period of time, and he has not acted, then it seems to me the public opinion of this country will determine very clearly where that accountability and the responsibility is. And they will put it clearly on the President.

Now, I do not think the President is going to do that, because he knows they will understand that to be the case. Therefore, he will not want to take that action and get himself in such a bind as that.

Senator ERVIN. What importance do you attribute to article II, section 2, which provides the conditions on which treaties should be made?

Dr. BYRD. First of all, just as a general answer, it is specific in the Constitution, a treaty shall be approved by two-thirds of the Senate to become effective, or in order for the President to ratify it. But if you mean the question whether or not I think that is the only means of international agreement provided for, either directly or by implication by the Constitution, then I do not agree to that.

I think the constitutional implication in many cases provided for international agreements other than treaty. It is occasionally

remarked, just as an example—sometimes we go roundabout to get a point. But as an example, that treaties are the only international instrument recognized or mentioned in the Constitution.

Well, strictly speaking, that is not so. The Congress may approve a compact between States—or to put it another way, compacts between States or compacts between a State or States and a foreign nation shall not become effective without the approval of the Congress. That is a compact which is not a treaty and the provisions for approving it are not the same as for the treaty, which is two-thirds of the Senate.

So the Constitution specifically in one instance does mention some instrument other than a treaty.

Senator ERVIN. What provision?

Dr. BYRD. What provision—I have to look it up.

Senator ERVIN. Because I cannot recall it.

Dr. BYRD. May I, just after I finish this? I will show it to you.

Senator ERVIN. You can finish your statement.

Dr. BYRD. Exactly. I brought the book with me.

Now, the point I was going to make is if the Congress has the power to approve a compact made by one State with a foreign nation, why shouldn't—

Senator ERVIN. I recall the clause about compacts between States, but that is part of the Union.

Dr. BYRD. And with a foreign nation. Yes. The point I was trying to make is if the Congress has the power—I mean both Houses of Congress by simple majority—has a power to approve a compact between a State and foreign nation, it is a fairly reasonable inference they would have the power to approve a compact between the Federal Government and a foreign nation.

That is one way that you get implications.

Senator ERVIN. With foreign countries?

Dr. BYRD. Yes, sir.

Senator ERVIN. The Congress could take charge of foreign policy in that case and exclude the President.

Dr. BYRD. No, not totally, I think, except by the appropriations route. Because, as I tried to point out in the very first of my statement, that one of the major distinctions that I have found historically between treaties and other agreements—or shall we put it this way, between the foreign affairs power functions of the Senate on the one hand and the foreign affairs power functions of the House of Representatives on the other hand, is that the Congress combined has only delegated powers to the Federal Government, but that the treaty power goes beyond the delegated power there as such, and is in itself a substantive power, rather than merely procedural. So as I indicated some examples, subject matters over which it has never been held or even suggested that Congress may pass legislation with a simple majority of the Congress, domestic or foreign, that would involve these, or control these, things reserved for the State, but that are in treaties from the very beginning.

The very first treaties have done this. So you have this very great distinction with regard to the Federal principle we have, since we are not a unitary government.

Senator ERVIN. I think I have the clause. Article I, section 10: "No State shall, without the consent of Congress, * * * enter into any agreement or compact with another State, or with a foreign power."

Dr. BYRD. Yes, sir.

Senator ERVIN. You construe that to imply that it authorizes Congress to make compacts with a foreign nation?

Dr. BYRD. No, sir, I did not say that.

Senator ERVIN. That is the reason I was asking you.

Dr. BYRD. I said the Federal Government.

What I would imply more specifically, would be there have been many more farfetched analogies drawn in law—and I am not telling you anything about this—than this, that if the Constitution recognizes that the Congress may approve an agreement with a foreign nation, made by a State, why in heaven's name couldn't it approve an agreement made with a foreign nation by the executive branch of the Government, which in the order of things, the national level would be much more important than that of a single, solitary State of the Union.

Senator ERVIN. I believe that is a non sequitur because I think the expression of one thing is the exclusion of another, and here there is a specific expression.

Dr. BYRD. Senator, if I may interrupt you. One of the problems in interpreting treaty power with being the only method—I know you do not do this but some do—as the only method of entering into international agreement, because the Constitution mentioned treaty and did not mention anything else, and the expression of that was exclusion of all others. I do not agree with any ironclad moves of logic in that direction.

Senator ERVIN. Also, section 10 of article I says no State shall enter into any treaty.

Dr. BYRD. Exactly. They may not enter into a treaty but may enter into an agreement.

This is such a long way of getting around, perhaps, the point I was making whether inferential or explicit, the Constitution provides for an instrument other than a treaty. I maintain that is one way it does and also as mentioned by the Senator who testified previously, Senator Fulbright, he kind of agreed the recognition power amounts to agreement power.

Senator ERVIN. Of course, I take the position that, as far as any agreement of substance, the treatymaking power is the only way an agreement can be made with a foreign nation.

Dr. BYRD. Legally.

Senator ERVIN. I recognize that a treaty has the force of law, and I also recognize that Congress has the power to legislate. I take the position, I think within the view of the Constitution, that the Executive has the power to make executive agreements to implement a treaty or a law, because his principal executive function is to see that laws are faithfully executed.

Dr. BYRD. I am glad you mentioned the distinction between these because, strictly speaking, when an executive agreement is mentioned to me, after I studied this so many years, it does not relate, it makes

no sense to me, just an executive agreement. It is either a combination of authority given by the Congress to the President, either by treaty or by statute, to enter into an agreement. And when that applies to other than treaty, I call that myself, to try to be more specific, a congressional executive agreement. Meaning invoking the powers of Congress and supplemented by the President in effectuating the power.

Then, in addition, the third type is what I call presidential agreements, or international presidential agreements, either of which are with regard to usage. So you can understand one another, which power of the Constitution you are talking about when you say presidential agreement.

What I call presidential agreement is the President invoking his own authority, and recognition agreement would be one of those, for example, you see.

Senator ERVIN. Of course, there is a great deal of difference between students of the subject with respect to the meaning of the executive power of the President.

Dr. BYRD Exactly.

Senator ERVIN. Because some of them take the position that it gives the President some powers which are not expressed in the Constitution and, of course, I will have to concede two Supreme Court decisions lend some content to that.

Dr. BYRD. I kind of presume you are talking about the inherent powers doctrine here which came out with *Curtiss-Wright*, for example. Would that be one you are speaking about?

Senator ERVIN. Yes.

Dr. BYRD. There is no one, I think, who has given more and stronger argument against that position than I have. I totally reject any idea of the inherent power doctrine, because by the very definition it means not subject to constitutional authority.

Senator ERVIN. Yes.

Dr. BYRD. And every individual, official in this country, as far as I am concerned, is operating legally under the authority of the Constitution, and no inherent power doctrine says he may do this or that just because he exists.

Senator ERVIN. I take the position, further that the only powers are those expressly granted or reasonably implied from the powers that are made. I think maybe you and I are in substantial agreement on that.

Dr. BYRD. Yes, indeed.

Senator ERVIN. Now, regretfully, I have not had a chance to read your book. I look forward to reading it.

Dr. BYRD. Thank you.

Senator ERVIN. If you have no objection, I would like to place in the record, immediately after your testimony, your article on the "Constitutional Limits on International Agreements in the Space Age."

Dr. BYRD. Certainly. Yes, indeed.

Senator ERVIN. Thank you.

(The document follows:)

CONSTITUTIONAL LIMITS ON INTERNATIONAL AGREEMENTS IN THE SPACE AGE

(By Elbert M. Byrd, Jr.¹)

Political scientist Byrd maintains that the Constitution as a flexible instrument can cope with the problems of the Space Age, if our social and political maturity can. He discusses limits on the treaty-making power, particularly when it affects federal-state relationships; the use of the commerce and international law clauses for international agreements; the effect of the unamendable equity of representation in the Senate clause; the "divorce mill" and "degree mill" problems; the status of aliens and their property; creation of new states; the Bricker Amendment; first amendment freedoms; the fifth, fourth, and fourteenth amendments; the feasibility of an international criminal court; article III and the sixth amendment respecting courts and jury trial; enforcement of an international arms control and inspection treaty in view of the constitutional prohibitions regarding search and seizure; other inherent powers of the President and implied and delegated powers of Congress.—Ed.

It is occasionally reported that law school deans feel it is a mistake for law students studying constitutional law to read the Constitution because it will only serve to confuse them. As a mere example, the principle to be derived from the case of *Marbury v. Madison*² will come through with a great deal of clarity, but to attempt to derive the principle from the words of the Constitution will perhaps involve a frustrating experience. While the objectives of law school training need not be discussed here, an objective of "total" understanding might be much better served if students were first presented with a set of facts similar to those in the *Marbury* case, and instructed to find the "answer" in the Constitution before they turn to the reported case itself.

As a generality, reported cases are of value. They are particularly significant when they record decisions on the same point in the same way throughout a long line of adjudications. They are of importance in those areas where previous cases have been overruled specifically or *sub silentio*, for the point in question is made clear and a new departure is afforded in terms of case law. Previous cases are also important, although less so, for the purpose of analogous reasoning or argument to a new but substantially related problem, particularly if the identical powers of government are called in question as between the two fact situations. But where there are involved powers of government which have never on a specific point been the subject of adjudication, and especially where the fact situations are also novel, it is likely to be found that reported cases are virtually useless.

It is in the latter kind of situation that the Constitution itself must be reopened. One may also reopen the classical records, debates and commentaries on the Constitution when it was fresh from the pen. Often the historical records will be found to be useless, for obviously one is not going to find answers to such questions as whether or not radio waves are part of commerce. Occasionally the uncontested words of a founding father will provide absolute semantic answers to current questions, and the researcher's pulse will tingle at the discovery. But one soon notes that for some questions the mental picture behind the words could not possibly have included the physical facts pertinent to the researcher. And for other questions, even though technological development is not involved, semantical development may well be crucial. For example, after the federal government was established, it was often referred to as "Congress" by those who had become accustomed to referring to the old organization under the Articles of Confederation as "Congress."³ Thus, when they used that word, one today is often uncertain as to whether they were referring to Congress or to the whole of the federal government. For another example, today's vocabulary certainly does not envision "the executive" as including the Senate of the United States, but one is not at all certain that the term did

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² 5 U.S. (1 Cranch) 137 (1803).

³ John Taylor of Caroline, for example, spoke within a single paragraph of the treaty power having been surrendered to "the United States," to "the General Government," and "to Congress." 3 BENTON, *ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1857* 14 (1857).

not include the Senate when used in the 1790s, especially when used in connection with the treaty-making power.⁴

On the other hand, satisfaction cannot be obtained from a mode of seeing the Constitution and the objects of its powers only as the founding fathers could have seen them. So proceeding would involve the necessity of amending the Constitution every time there is a new technological development which demands regulation. Disregarding technological problems, such a procedure rejects the oft-made statements of the founders themselves to the effect that foreign affairs powers must be capable of meeting any new contingency, that "the circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed," as Alexander Hamilton stated;⁵ or as put by Edmund Randolph: "The various contingencies which may form the objects of treaties, are, in the nature of things, incapable of definition. The government ought to have power to provide for every contingency."⁶ There is certainly no foundation here for limiting the subjects of treaties to those which historically had been included up to the time of adoption of the Constitution, as has been intimated⁷ and inferred.⁸

Even today, as one's physical or intellectual environment varies, so will descriptive attitude toward the Constitution vary. United Kingdom scholars are often heard to speak of the United States Constitution as "rigid," ostensibly because it is rigid when compared to their own lack of a written constitution at all, but more probably because so much has been broadcast about unconstitutional absolutes. French scholars, Latin American officials, and students of American state governments are occasionally heard to marvel, however, about the "flexibility" of the United States Constitution—because their own are more specific, more detailed and lengthy, and consequently more often amended. Then there are the ambivalent impulses and attitudes within the breasts and minds of those who have sworn allegiance to the Constitution, and have vowed to defend it against all enemies whomsoever, domestic or foreign. To such a sacred and patriotic symbol is ordinarily due descriptive adjectives connoting praise and respect: "flexible" sounds more flattering than "ambiguous"; "a most perfect instrument, designed to stand the stress of time" sounds more noble than "a malleable instrument, subject to change as new problems are met"; fewer conflicting passions are aroused if one speaks of the Supreme Court as "interpreting" rather than "amending" the Constitution.

Throughout the history of the Constitution it has been seen in many an extraordinary light. It is well known that to Hamilton it was so weak that it couldn't last beyond ten years.⁹ Edmund Randolph wrote to Washington about how "ambiguous is the language of the Constitution."¹⁰ Patrick Henry and others thought it was "a conspiracy against the liberties of a free people." Thomas Jefferson feared that he was violating the Constitution by purchasing the Louisiana Territory, but his close friend the great strict constructionist John Taylor of Carolina came to the Senate to argue in favor of constitutionality on grounds of *broad* construction of the treaty power.¹¹ Abraham Lincoln, apparently accordingly to his own lights,¹² violated many parts of the Constitution, but in doing so he vigilantly upheld the part which at the time appeared most important to him, the requirement that he preserve and protect the Constitution.¹³

⁴ In discussing international agreements during the Jay Treaty debates in 1796, Abraham Baldwin said: "I considered that the executive has absolute power to make peace, as by the constitution he is declared commander in chief of all the armies." Here "executive" and "absolute" power seem clear enough, but he immediately added, "that power was properly vested in him, guarded by two-thirds of the Senate DEBATES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, DURING THE FIRST SESSION OF THE FOURTH CONGRESS UPON THE CONSTITUTIONAL POWER OF THE HOUSE WITH RESPECT TO TREATIES 132 (printed for Benj. Franklin Bache by Bioren & Madan 1796).

⁵ THE FEDERALIST No. 23 (Hamilton).

⁶ 3 ELLIOTT'S: DEBATES 363 (1836).

⁷ Fraser, *Treaties and Executive Agreements*, S. Doc. No. 244, 78th Cong., 2d Sess. (1944).

⁸ Bricker, *Making Treaties and Other International Agreements*, 289 Annals 134 (1953). For similar expressions, see *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242-43 (1872); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840).

⁹ 10 Lodge, THE WORKS OF ALEXANDER HAMILTON 425 (1904).

¹⁰ 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 77 (1922).

¹¹ 3 BENTON, ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856 14 (1857).

¹² Cf. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1951).

¹³ U.S. CONST. art. II, § 1.

There were always cries of outrage, of course, so much so that near the turn of the century it could be noticed, long before the New Freedom or the New Deal or the Fair Deal were ever heard of, that according to what "has been solemnly and passionately asserted by statesmen and lawyers" the historical region as a whole can be seen as "strewn with the wrecks of the Constitution," but that such wailings really revealed "the littleness and the looseness of men's interpretations of the Constitution."¹⁴ But those who saw the Constitution as a "precise" and "clear" instrument were not silenced. They came on to proclaim that the provisions of the Constitution were "expressed by our ancestors in such plain English words that it would seem the ingenuity of man could not evade them,"¹⁵ and that when the constitutionality of a statute is in question, the Court has the duty "to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former."¹⁶

It is not the judiciary only that interprets the Constitution, of course. The President is bound also to interpret the Constitution, as Andrew Jackson explained while expanding the powers of his office;¹⁷ and as Dwight Eisenhower did while in effect weakening the office.¹⁸ The Congress also must and does interpret the Constitution almost daily when in session. The Congress is given power to make its own rules.¹⁹ The Senate may by majority vote declare that the Constitution makes of it a continuing body, but a majority vote can also proclaim the opposite if it wishes to adopt new rules at the beginning of a new Congress; and this is one of the questions which the Supreme Court will frankly label as too "political" for it to attempt to adjudicate. Perhaps it is enlightening to understand that when the Court refuses to decide such a "political" question, it has decided—and politically so.

It has often been stated, and in general correctly, that rights and limitations can be written into a Constitution in great profusion, but they are not worth the paper upon which they are written unless courts of an independent nature are established to enforce them. It is also true, however, that courts are instruments of the body politic, that their rock-bottom foundation is political, and that they are ineffective and helpless in the face of predominating public opinion.²⁰ One need only refer to the record of the Supreme Court in the area of civil liberties during the Civil, the First and the Second World Wars.

The following discussion is based in large part on the foregoing observations, specifically as applied to the treaty making power under the Constitution.²¹ The possibilities envisioned in some of the more or less hypothetical situations, it appears almost unnecessary to record, do not in any sense reflect the desires or even the predictions of the author. They reflect, in general, possibilities which Thomas Jefferson would characterize contemptuously as those which might be "squeezed out" of the Constitution.²² There are probably those who would scream that such interpretations make "a monster" of our Constitution, as Abraham Baldwin put it in 1796.²³ That could be so—in terms of traditional thought about it. But it must be emphatically underscored that the approach here is one of facing the Constitution with the dawning problems in an effort to determine what the Constitution can answer. This means that the doctrine of popular sovereignty is maintained, that government is still to be viewed as answerable to the people through their fundamental law. If they disagree with the interpretations of their Constitution, they can reverse them by amendment as they have done in the past.²⁴ This ap-

¹⁴ Thayer, *Our New Possessions*, 12 HARV. REV. 464 (1899).

¹⁵ Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 499 (1934).

¹⁶ United States v. Butler, 297 U.S. 1 (1936).

¹⁷ L. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1145 (1894).

¹⁸ For example, Eisenhower said he did not have the power to issue a posthumous pardon. See news reports *circa* Dec. 13, 1958. The Constitution does not say he is thus restricted, and no Supreme Court decision has so held.

¹⁹ U.S. CONST. art. I, § 5.

²⁰ The late Justice Jackson spoke in this vein when he proclaimed that no court could have prevented the Civil War, or the executions of Louis XVI and Marie Antoinette, or the French Revolution and Napoleon's dictatorship, or the rise of Hitler. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 80-81 (1955). Further, he said, against the war power and "inflation" power the Court can do nothing. *Id.* at 61.

²¹ "The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. CONST. art. II, § 2, cl. 2.

²² Letter from Thomas Jefferson to Associate Justice William Johnson, June 12, 1823, in MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 160 (1954).

²³ HOUSE DEBATES, *op. cit.* *supra* note 3, at 121.

²⁴ U.S. CONST. amends. XI, XIII, & XVI.

proach is far removed from those who long ago solved the problem for themselves by embracing the "inherent powers" doctrine, a doctrine which simply asserts that in foreign affairs the powers of the federal government are unlimited, and that these powers do not derive from the Constitution but from "international law."²⁵

II.

From a legal viewpoint alone, one no longer needs to hesitate extensively over the question of whether the treaty power is limited by the powers reserved to the states.²⁶ The treaty power has not been so limited since the Constitution was adopted, as the early case of *Ware v. Hylton*²⁷ demonstrated in regard to debts owed to foreigners. Many other cases²⁸ dealt with such subjects as inheritance of land.²⁹ The very first treaties entered into by the federal government bestowed upon foreign consuls in this country power to try their countrymen in state ports to the exclusion of state authorities,³⁰ but it has often been stated that, absent a treaty, "offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority."³¹ Many other "reserved" subjects were included in unadjudicated treaties³² be-

²⁵ BURNS & PELTASON, *GOVERNMENT OF THE PEOPLE* 89-94 (1957); SVARLEIN, *AN INTRODUCTION TO THE LAW OF NATIONS* 265-66 (1955); FERGUSON & McHENRY, *ELEMENTS OF AMERICAN GOVERNMENTS* 240 (1958); CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 18 (1944); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 *YALE L.J.* 225 (1945). Cf. BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* (1902).

²⁶ Of course, if one wishes to be entirely semantical about it, it can be said that the treaty power is limited by reserved powers if it is also said that the subjects of those reservations are entirely unknown. Thus, after stating that the subject matters reserved by the ninth and tenth amendments are "completely unknown," one writer continues: "But whatever they are no officer or department of the Government of the United States . . . may deal with them . . . No treaty or executive agreement can deal with these reserved and retained powers, nor with the subject matter encompassed by these reserved and retained powers." LEVITT, *THE PRESIDENT AND THE INTERNATIONAL AFFAIRS OF THE UNITED STATES* 69 (1954).

²⁷ 3 U.S. (3 Dallas) 199 (1796). During the Revolutionary War, the State of Virginia passed legislation providing that Virginians could pay to the State of Virginia debts owed by Virginians to British subjects. The funds received would be used to help finance the war against Great Britain, and it was provided that the debts to British creditors would thus be liquidated even though they were paid in depreciated currency rather than sterling. The Peace Treaty of 1783 (Definitive Treaty of Peace With Great Britain, Sept. 3, 1783, 8 Stat. 80, T.S. No. 104) and the Jay Treaty of 1794 (Treaty of Amity, Commerce, & Navigation With Great Britain, Nov. 19, 1794, 8 Stat. 116, T.S. No. 116) by way of reiteration, provided that Virginia's law would be no bar to collection of the amounts owed to British creditors. Not until after the adoption of the Constitution was it possible to enforce this part of the treaty. The decision of the Supreme Court in *Ware v. Hylton* was in favor of the British creditors, Virginia law and the arguments of Virginia counsel John Marshall to the contrary notwithstanding.

²⁸ *Geoffroy v. Riggs*, 133 U.S. 258 (1889); *Hansenstein v. Lynham*, 100 U.S. 483 (1879); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817).

²⁹ Regarding the inheritance of land, absent a treaty, "It would be difficult to find a subject matter over which a state had a more clearly recognized historic power and as to which no power was delegated to Congress." Dowling, *The Problem of the Federal State in Foreign Affairs* FEDERALISM MATURE AND EMERGENT 255 (MacMahon ed. 1955). Cf. *United States v. Burnison*, 339 U.S. 87 (1950); *Sullivan v. Kidd*, 254 U.S. 433 (1920); *United States v. Fox*, 94 U.S. 315 (1877).

³⁰ Consular Convention With France, Nov. 14, 1788, art. VIII, 8 Stat. 106, T.S. No. 84 (1789).

³¹ *Wildenhuss' Case*, 120 U.S. 1 (1887). During an altercation in the hold of a Belgian ship, while docked in the port of Jersey City, Wildenhuss killed a Belgian shipmate. Wildenhuss was arrested and held by New Jersey authorities. The Belgian Consul applied for release of Wildenhuss, by *habeas corpus*, in order that he could be tried by Belgian courts, citing the Consular Convention With Belgium, March 9, 1880, 21 Stat. 776, T.S. No. 29 which provided that consuls of each nation had exclusive jurisdiction of the internal order of the merchant vessels of their nation, "and shall alone take cognizance of all differences which may arise either at sea or in port." It was further provided that local authorities "shall not interfere, except when the disorder that has arisen is of such nature as to disturb tranquility and public order on shore or in the port." The application of the Belgian Consul was denied on the ground that the tranquility of the port was disturbed. Thus, *interpretation* of the treaty was principally involved. As to the general problem, the Court noted that, absent a treaty, the local government has jurisdiction over foreign vessels docked in the ports of a state when criminal offenses are involved.

³² Examples were: exemptions of consuls from state taxation; authority of consuls to act as notaries public, to take depositions and last wills and testaments, to administer estates of deceased countrymen, and to try civil suits between their countrymen; prohibition of criminal prosecution by the states in certain cases; prohibition of state discrimination against aliens as to operation of businesses; provision for punishment as "disturbers of the peace" for those who insulted British naval officers; provision that state courts could not deny suits by alien litigants; provision for legality of miscegenation; and provisions for federal issuance of fishing licenses.

fore the Supreme Court upheld the validity of the treaty power in respect to regulation of the shooting of migratory birds in *Missouri v. Holland*.³³ There was no new principle in this case, but it served to show boldly the extent of the treaty power and eventually helped bring on the furor over the "Bricker Amendment." There were many versions of the Bricker Amendment, but Senate Joint Resolution 1 reported favorably by the Senate Committee on the Judiciary in 1953 would have eliminated the substantive treaty power from the Constitution,³⁴ reversing the principle contained in *Missouri v. Holland*. That amendment was not passed, and the full treaty power remains legally as unfettered as before.

There have often been statements made since *Missouri v. Holland* to the effect that, although the treaty power is not limited by state powers, nevertheless the treaty power is limited to those subjects which are *really* important to international affairs. That is to say, it may be unconstitutional to enter into a treaty for the purpose of altering the federal-state relationship rather than to advance legitimate international goals. It would be unconstitutional, it is said, to enter into a treaty with, for example, the Congo under which the Congolese government guarantees that there shall be no ban against inter-racial marriages in the Congo in return for which there shall be no ban against inter-racial marriages throughout the United States. The most that could be legally contracted for, the argument goes, is the removal of a ban in the United States against marriage with *Congolese*,³⁵ and even this may not be held as sufficiently related to international affairs. Tempers flare in this type of argument, and if it is found that someone has said that domestic and foreign affairs can no longer be differentiated one from the other in the modern world, scorn is heaped.³⁶

The unfruitfulness of this mode of approach is apparent in the ire it arouses. Senators who cry to heaven in utter dismay about the *possibility* of the treaty power being used in this manner, and about the *possibility* of such a treaty being held constitutional by the Supreme Court, have for the foreseeable future decided the issue by their very protest. The Senate is certainly not going to approve a treaty of such import, and the Supreme Court is not going to have the opportunity to decide the constitutionality of the non-existing treaty.³⁷ This means, therefore, that the first and principal limitation upon the treaty power is political, especially in regard to federal-state relations. If, by some strange development, it should become the widely held public opinion within, say, fifty years that such a treaty with the Congo is vital to United States foreign policy, and two-thirds of the Senators of the United States are also of such opinion, it would indeed be presumptuous, perhaps even politically suicidal, for the Supreme Court to hold otherwise.

It is undoubtedly to be expected that, from a historical view, there will come a new public opinion in the future which, on some subjects now hardly mentionable, will be highly crystallized and solidified. Whether this public opinion will be more international or more national, more cosmopolitan or more parochial, is at this juncture impossible to predict. There are indications

³³ 252 U.S. 416 (1920). The case concerned the constitutionality of the Migratory Bird Treaty Act of 1918, 16 U.S.C. § 703 (1960), for the enforcement of a treaty of December, 1916, with Great Britain on behalf of Canada for the protection of migratory birds. The question before the Court was "whether the treaty and statute are void as an interference with the rights reserved to the States." 252 U.S. at 432. The Court held in the negative. Previous similar legislation, passed in the absence of a treaty as the first step, had been declared invalid in lower federal courts as interfering with reserved powers of the states, *United States v. McCullagh*, 221 Fed. 228 (D. Kan. 1915); *United States v. Shauer*, 214 Fed. 154 (E.D. Ark. 1914).

³⁴ S.J. Res. 1, 83d Cong., 1st Sess. (1953).

³⁵ By the Treaty of Friendship, Amity, Commerce, & Consular Privileges With El Salvador, Dec. 6, 1870, art. XXIX, 18 Stat. 725. T.S. No. 310, intermarriage of natives with visiting citizens of both countries was provided for, and such marriages were to be considered legal in both countries.

³⁶ The 1267-page record of the 1953 hearings on the Bricker Amendment is saturated with indignation over a similar statement, *Hearings Before the Subcommittee on Treaties and Executive Agreements of the Senate Committee on the Judiciary*, 83rd Cong., 1st Sess. (1953). But no indignation was recorded when, in 1796, Congressman Jonathan Havens said, "There never can be any precise boundary line marked out between what has been usually called 'internal and external relations.'" HOUSE DEBATES, *op. cit. supra* note 3 at 65.

³⁷ The great fear expressed during the Bricker Amendment controversy, that the nation may be deliberately destroyed by treaties, is valid to no greater extent than the proposition is true that the nation may be destroyed by its own laws. As a mere exercise in logic, it would be easier to destroy the nation by Congressional statutes than by treaties.

pointing in both directions. Some technological and economic developments point to more interdependence and international mindedness. Some political and legal developments point toward more nationalism.³⁸ During the last decade public opinion has hovered around a storm center of uneasiness and uncertainty as if afraid to advance in any direction. The result has been a great deal of torpor. Dilemma has abounded on every side. "New" opinion has been rejected because it, too, has posed uncertainty. Most any subject tends to become controversial in this atmosphere, and controversial subjects mean divided opinion. The possibilities as to constitutional limitations are somewhat restricted, therefore, by the divided nature of public opinion today. It is therefore necessary to pay obeisance to "traditional" approaches to constitutional limitations as well as to the apparent new demands made by the Space Age.

Although many of the treaties involving federal-state relations have not been adjudicated,³⁹ the principle is clear that treaties, if approved by the Senate, prevail over all conflicting state laws. To what extent treaties which interfere with laws of the states will be passed, and to what extent enforced, is entirely conjectural. Legally they could be used to deal with such a subject as conflict of laws respecting interpretation of contracts. A treaty could incorporate a contract code of its own or it could provide for interpretation according to the law of a designated jurisdiction. If such a treaty were of a multilateral nature it could reach virtually all contracts made in international commerce.

A treaty could legally settle the "divorce mill" problem as between, for example, the United States and Mexico. A treaty could specify a minimum period of residence for United States citizens in Mexico and *vice versa* before a divorce could be granted. A multilateral treaty could, of course, extend the coverage. The same is true of requirements for marriage. This would still leave the "interstate" problem unsettled within the United States, although some au-

³⁸ From 1923 to 1953 United States commercial treaties contained provisions whereby the parties were pledged to disregard foreign citizenship of an individual in licensing to practice the professions, such as law, medicine, and accounting. Political pressure, beginning in 1953, resulted in the removal of such practice-of-professions provisions from treaties, leaving the questions to be determined by local laws. Phleger, *United States Treaties: Recent Developments*, U.S. DEP'T OF STATE PUB. NO. 6376 (Aug. 1956). The author has personally observed a state legislature refuse to make an exception for a Hungarian refugee to practice medicine in a hospital even though the refugee had been a surgeon for many years whose skill was readily verified.

³⁹ Such as the Treaty of Commerce and Navigation With Japan, Nov. 22, 1894, 29 Stat. 848, T.S. No. 192 disputed by California in 1906 in an early "school segregation" question. Article I of the treaty provided, *inter alia*, that "in whatever relates to rights of residence . . . the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties, and rights . . . [as] native citizens or subjects, or citizens or subjects of the most favored nation." In 1906 the San Francisco School Board ordered Japanese children segregated in a special school, reflecting in part the West Coast agitation against Japanese immigration. The situation was eased in 1907 by the "Gentlemen's Agreement" (set out in WILLIAMS, *THE SHAPING OF AMERICAN DIPLOMACY* 495-98 (1956)) according to which the Japanese government agreed not to issue passports to Japanese laborers desiring to go to the United States in exchange for efforts by the United States to prevent discriminatory legislation by the states. On December 3, 1906, before the agreement was reached, President Theodore Roosevelt praised the Japanese people, said "to shut them out from the public schools is a wicked absurdity," and recommended criminal and civil statutes to enable the President "to enforce the rights of aliens under treaties." 10 RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 7434-35 (1913).

Aside from the public debate over the interpretation of the treaty, there was much debate over the validity of a treaty which purported to prevent discrimination in education within public school systems operated by the states. On December 12, 1906, Senator Isidor Rayner of Maryland made a long speech in the Senate against the validity of such a treaty. 41 CONG. REC. 281-88 (1906). Senator (later Associate Justice) George Sutherland contested Rayner's view in a Congressional study released in 1909, Sutherland, *The Internal and External Powers of the National Government*, 61st Cong., 2d Sess. (1909). He later referred to the case as follows:

The contention over the exclusion of the Japanese from the public schools in California . . . [is] still fresh in our minds. Only the exercise of great tact, forbearance and patience on the part of the responsible officials of both countries, prevented an embarrassing situation from becoming dangerously critical. Whether the proper construction of the treaty involved would justify the claims of the Japanese government or those of California is fairly open to question; but that the treaty making power of the United States is competent to accord privileges which were claimed for the subjects of Japan is not, in my judgment, open to legitimate dispute.

SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 162-63 (1919). The occasion never arose for judicial construction of the treaty. For further exposition and analysis, see Hershey, *The Japanese School Question and the Treaty-Making Power*, 1 AM. POL. SCI. REV. 393-409 (1907); Root, *The Real Question Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT'L L. 273-86 (1907).

thorities feel that it could be eliminated by use of the full faith and credit clause of the Constitution.⁴⁰

State powers are already interfered with by way of exemption of state taxes on consuls,⁴¹ and by way of exempting military personnel of foreign powers from driver-license requirements under status of forces treaties.⁴² A subject which possibly could bring action by the federal government is that of the "degree mills," so-called educational institutions which sell worthless "degrees" to persons in foreign countries and thus breed ill-will toward the United States. This practice may, by penalty, be eliminated under the foreign commerce power of Congress, or it could be done by a multilateral treaty with accompanying legislation for enforcement.

As to the *legal* validity of federal action, there are many other subjects which could be examined, as respecting the treaty power, but they are less novel today than in times past. The "growth" of other powers such as the commerce power and "spending" power via grant-in-aid/conditions-attached formulae has resulted in the federal-state division of power problem becoming one principally of political rather than constitutional limitations. The treaty power remains most important, as to federal-state relations, in such traditional subjects as consular status pertaining to judicial powers and tax exemption, inheritance of estates by aliens, ownership of land by aliens, and right of aliens to participate in business, all on a reciprocal basis with foreign countries. Should the United States Government suddenly find itself without the "treaty-making" power, it may provide for some of the foregoing traditional treaty subjects by use of other delegated powers such as those of the commerce and international law⁴³ clauses, but protracted legislation—and adjudicatory trial and error—would accompany the development. Whether the problem of ensuring the right to ownership of land by aliens could be solved without constitutional amendment is doubtful.

The all-important constitutional right of the states, however, is one that is seldom referred to within the context of treaty power limitations. That is the constitutional provision for equality of representation in the Senate,⁴⁴ coupled with the un-amendability of this provision of the Constitution.⁴⁵ This characteristic of state protection needs much emphasized study in order to grasp the extent of its implications. The subject will not be pursued here, but the Senator seen as both state and national legislator, combined with the two-thirds majority rule, points the way to a delimitation of the extent of the treaty power as against other international agreements approved by simple majorities of both Houses of Congress.

Important, also, in the federal-state area is the prohibition against combining territory of two or more states into one, or separating parts of one or more in order to make a new state, without the approval of the state or states involved.⁴⁶ In times of dire stress, however, there may arise the problem of helping "establish" a new state government in order that its approval may be received—which is the short-hand story of the creation of West Virginia. Whether the United States could constitutionally cede a state's territory to a foreign power, in order to negotiate a peace, has often been discussed, and sometimes with great heat. It is often remarked that it would be best to obtain the approval of the state or states involved, but the cession is not constitutionally prohibited, and the better argument is that it would be constitutional.⁴⁷

⁴⁰ CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 684 (1953). Cf. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1955).

⁴¹ See, e.g., Consular Convention With France, 1788, art. II 10 Stat. 992, T.S. No. 92 (1853).

⁴² North Atlantic Treaty, Status of Forces, art. IV, June 19, 1951, [1953] 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846.

⁴³ See text accompanying note 80 *infra*.

⁴⁴ U.S. CONST. art. I, § 3.

⁴⁵ U.S. CONST. art. V.

⁴⁶ U.S. CONST. art. IV, § 3, cl. 1.

⁴⁷ The Constitution guarantees a "republican form" of government to the states, U.S. CONST. art. IV, § 4. Thus, one has no difficulty in determining that a treaty would be unconstitutional if it provided for a nonrepublican form of government for the states. A more difficult task, however, would involve, first, the drawing up of a detailed definition of "republican form" of government, and then, second, attempting to find a state, which conforms to the definition.

With respect to the states of the Union, only one more point will be touched upon here. This is the question of admitting states into the Union. Congress is given the power to admit new states.⁴⁸ Could a state be admitted, instead, by treaty? The early commentators appeared to think not. In speaking of the problem existing in the 1840s in connection with the annexation of Texas, a historian probably reflected the sentiment of the time correctly when he stated flatly, "the treaty-making power could only admit her to the Union as a Territory," not as a state.⁴⁹ John Taylor of Caroline had said earlier, "It is conceded that the treaty-making power cannot, by treaty, erect a new State."⁵⁰ The reason for the statements was that power to admit new states was given to Congress, and the commentators tended to view this power as *exclusive*. But exactly the same reasoning would prevent a treaty from touching commerce or any other subject upon which Congress may legislate. Scores of treaties, early and modern, deny that proposition. This subject was the principal concern in the fascinating but detailed Jay Treaty debates.⁵¹ Suffice it here to say that a treaty with an independent country could legally admit it as a state, as an act of Congress could also do, but political wisdom might well result in the invoking of both powers. In a symposium on the Space Age, in which one at best sees only dimly across vast stretches a maze of new relationships, both physical and intellectual, prediction is hazardous indeed. But the author will hazard only one: given survival, given escape from nuclear war, the power to admit new states into the Union will be exercised rather frequently during the century to come.

III.

The foregoing considerations indicate that although the future could bring a great deal of political conflict in the field of federal-state relations *vis-a-vis* exercise of the treaty power, there is not likely to be much constitutional conflict of an adjudicatory nature.⁵² Exclusive of the federal-state relations area, however, a greater degree of judicial conflict can be expected in regard to the limitations on the treaty power, partly as distinct from limitations on the powers of Congress. What could be the nature of some of these conflicts?

Perhaps the most potent source of possible future judicial conflict lies in the wording of the first amendment to the Constitution which provides that *Congress* "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Now even with regard to the powers of *Congress*, it is often observed by commentators that, in view of the interpretations placed upon them, these words do not really mean what they say.⁵³ Be that as it may, the limitation by its bare words does not apply to the treaty-making branch which is comprised of two-thirds of the Senators present along with the President, and is not comprised of Congress. The point was

⁴⁸ U.S. CONST. art. IV, § 3, cl. 1.

⁴⁹ SMITH, *THE ANNEXATION OF TEXAS* 127 (corrected ed.), 1941.

⁵⁰ BENTON, *op. cit. supra* note 10, at 14.

⁵¹ See House Debates, *op. cit. supra* note 3.

⁵² This does not mean that there may not be a great deal of judicial conflict regarding the foreign affairs powers of Congress when used as a substitute for the treaty power, especially if now ground is explored in the federal-state area.

⁵³ By a most restrictive semanticism, some of them might be made to agree literally with judicial interpretations placed upon them. Thus, if it is determined that "law respecting an establishment of religion" does not mean to imply a law *about* a religious establishment (organization), but, rather, that it means a law tending toward the establishment of a national religion, then a large number of laws about or favorable to certain religions can be sustained. Similarly, if the "religion," the free exercise of which is not to be prohibited, is not understood to be "religion" as defined by its practitioners but, rather, "religion" as defined (even if empirically so) by the "government" or the Supreme Court, then prohibition of the free exercise of certain "religions" freedoms can be sustained and viewed as not violative of the first amendment. Thus polygamy can be prohibited. It is opinion, even if deeply implanted by culture, which determines this defining process. "Freedom of speech," on the other hand, is so literal that it becomes virtually impossible to define it away in its own terms. Sustaining restrictions upon it is possible only by setting the protection of free speech alongside a provision for protection of something else—such as the military protection of security or the general welfare or police protections—and then "weighing the balance." This may, of course avoid the proposition that an affirmative power delegated had to be exercised under the handicaps of the negative limitations. For a recent and interest analysis of the "balance" versus the "absolute" approach in the area of civil liberties, see Chas. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, Harper's Magazine, Feb. 1961, p. 63.

made very early when the Constitution was being discussed, to include the worried statement in 1796 by Abraham Baldwin, that a construction might be made to result in many acts "which are prohibited to Congress, but not prohibited to the makers of treaties."⁵⁴ This observation was immediately answered by James Hillhouse, when he said that this could not happen because "it is a sound rule of construction, that what is forbidden to be done by all branches of the government conjointly, cannot be done by one or more of them separately."⁵⁵ Authorities since that time have often spoken in the same vein, but it has rarely been pointed out that "Congress" is *not* all of the branches of government conjointly, and that it could be argued that what is prohibited to Congress, where a simple majority rule prevails, would not necessarily be prohibited to the Senate when the two-thirds majority rule is operative, and when a delicate problem of international affairs is the subject.

Another manner of arguing that the first amendment applies to treaties, at least in the modern era, is to note that the first amendment is applicable to the states by way of the due process clause of the fourteenth amendment, that there is also a due process clause in the fifth amendment, that the fifth amendment is cast in absolute terms rather than directed solely to Congress, and that therefore the first amendment is applicable to the treaty power because of incorporation of the first amendment within the fifth amendment.⁵⁶ This position is held in spite of the fact that not all of the absolute prohibitions have become part of the due process clause of the fourteenth amendment; and in spite of the fact that this view imputes redundancy to the drafters of the first and fifth amendments.

What the "due process" is that shall not be denied is, of course, a very indefinite thing. As New Jersey Chief Justice Joseph Weintraub has recently said:

One may read the commerce clause, the due process clause, the equal protection clause, a thousand times and still not detect the slightest clue to the proper decision. The answer must be found elsewhere. The Constitutional framework, as we all know is a mere skeleton expression of governmental power and individual rights. The actual contours of those powers and rights must be determined in the context of changing conditions, by a process which is more than a mere mechanical application of a constitutional phrase to a set of facts.⁵⁷

Justice Weintraub's statement is particularly true for the "unprovided case" where no decisions are on record to point to "settled law." In no area of American law is this more true than in that pertaining to limitations on the treaty power. To be sure, there are innumerable dicta in cases in which the treaty power *vis-a-vis* an alleged right is not in issue. There are statements which even refer to the treaty power directly, saying apparently that this power is subject to the same limitations as the powers of Congress. Thus Justice Black, writing an opinion for himself and three other Justices, says:

The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.⁵⁸

Now the intent here is to criticize neither the decision in this case nor the spirit of the above dictum. The decision was undoubtedly of great value in setting the Bricker Amendment movement to rest. Further, the "spirit" of the decision is supported by this writer at this point in history. But opinion of today, or interpretations of today, will not necessarily control opinion or interpretations of the future. The dictum is susceptible to a great deal of interpretation. It can easily be noted that not *all* the prohibitions of the Constitution apply to every branch of the national government, and when they do apply, they do not apply to all in the same way.⁵⁹ But, more importantly, the ques-

⁵⁴ HOUSE DEBATES, *op. cit.* note 3, at 120.

⁵⁵ *Id.* at 268.

⁵⁶ "Read literally, the First Amendment of the Constitution forbids only Congress to abridge these freedoms. But as the due process clause of the Fourteenth Amendment extends the prohibition to all state action, the due process clause of the Fifth must extend it to all federal action." Joint Anti-Fascist Refugee Comm. v. Clark, 177 F.2d 79, 87 (D.C. Cir. 1949).

⁵⁷ Statement in release of the Conference of Chief Justices, August 23, 1958, Harv. L. Record, Oct. 23, 1958, (Insert), p. B.

⁵⁸ Reid v. Covert, 354 U.S. 1 (1957).

⁵⁹ The Senate cannot initiate revenue bills: the House cannot try impeachments, and the President of the Senate cannot preside when the President of the United States is on trial; the Congress does not have executive power; and while the Supreme Court may declare an act of Congress invalid, it cannot do so if its jurisdiction has been removed by Congress, etc.

tion will turn preeminently on what the specific prohibitions are in a particular case, not on whether they apply. It is certain that Supreme Court opinions themselves face great hurdles of "interpretation" even by lower federal and state courts,⁶⁰ not to mention those of future Presidents, Congressmen, and Supreme Court Justices.

If "the prohibitions of the Constitution" all apply to the treaty-making agency in the same way and to the same extent that they apply to Congress, then it would be hard to avoid the conclusion that the United States has been a party to a good number of unconstitutional treaties. For example, the Treaty of Amity and Commerce With Japan, concluded July 29, 1858, included a provision under which American citizens in Japan were prohibited from offering "any insult or injury to Japanese religious ceremonies, or to the objects of their worship," and were prohibited from doing anything "to excite religious animosity."⁶¹ This was important at the time, of course, because of the objection by the Japanese to some of the missionary activities in Japan. The treaty included no explicit provisions for enforcing the prohibitions, but there would appear to be no reason why punishments of individuals for violations of such provisions could not be inserted in treaties or why enforcement statutes could not be passed by Congress under the necessary and proper clause. Certainly the defendants in such a case would maintain that the right to "insult" the practice of idolatry is part of freedom of religion and of speech protected by the first amendment. If the courts held otherwise, then a similar prohibition would be legal within the United States. If they wished to avoid the latter, they would be required either to declare the treaty unconstitutional or to hold that the first amendment is not applicable to the treaty power—all of this, of course, if logical and rational grounds were relied upon. These are "delicate matters," as so often stated, and the courts may push through to a decision beclouded with obfuscation. Depending upon the political climate, the executive may avoid part of the problem by agreeing in the treaties to waive jurisdiction and allow trial and punishment by the foreign government concerned. This alternative can be severely objected to, however, by those who feel that the defendants would thus be deprived of customary procedural rights which would be theirs if tried by United States courts. Few treaties, incidentally, have ever been as specific in these matters as the Japanese Treaty of 1858. Most of them have provided the right to Americans in the country to practice their religion "provided they respect the religion of the country in which they reside, as well as the constitution, laws, and customs of the country."⁶² The meaning to be attached to "respect" would be controlling in these instances, and is susceptible of more vagueness than in the case of "insult," "injury," or the exciting of "religious animosity."

Other difficulties can arise, not only from the vagueness of the constitutional provisions, but from the vagueness of the provisions in treaties. The proposed Genocide Convention declared genocide to be a crime, for example, and part of the definition of genocide was "causing serious bodily or mental harm to members of the group. . . ." ⁶³ In all probability the drafters thought of serious mental harm in terms of such activities as came to be known as "brain washing," but the inexactitude of the phraseology "mental harm" was such as to cause a great deal of perturbation on the part of many United States Senators and others. Adoption and attempted implementation of such vague language would leave to the courts the final subjective decision as to whether criminal acts were committed even when, for example, a publication is critical of any racial or national group or any member thereof. "Interpretation" of such vague words undoubtedly would result, within the foreseeable future, in deci-

⁶⁰ Cf. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

⁶¹ Treaty of Amity and Commerce With Japan, July 29, 1858, 12 Stat. 1051, T.S. No. 185, 1 MALLOY'S TREATIES 1004.

⁶² Treaty of Friendship, Commerce, and Navigation With Honduras, July 4, 1864, 13 Stat. 699, T.S. No. 172, 1 MALLOY'S TREATIES 956. More troublesome, in theory, was the wording in an 1868 treaty with China providing that "Chinese subjects in the United States shall enjoy entire liberty of conscience, and shall be exempt from all disability . . . on account of their religious faiths or worship." Treaty of Immigration With China, July 28, 1868, 16 Stat. 739, T.S. No. 48, 1 MALLOY'S TREATIES 235. Some states provided, and still provide, that witnesses who do not believe in God and a moral system of rewards and punishments may not give admissible testimony. There would seem to be a "disability" in such cases because of religious beliefs. Cf. *Arnd v. Amling*, 53 Md. 192 (1879).

⁶³ 78 U.N.T.S. No. 1021, p. 277 (1951), 45 AM. J. INT'L L. 7 (Supp. 1951).

sions held to be entirely compatible with the first amendment. It is conceivable, however, that a treaty could be written which would pertain to newsmen abroad, which would, *within the subject foreign country*, increase the freedom of gathering and transmission of news, but which would leave the newsmen with less freedom than they enjoy in the United States. If, however, the treaty should include specific prohibitions, and provide for violations and punishment to be inflicted by United States courts after the newsmen return to the United States, would convictions be sustained in order to enforce the treaty even though it be conceded that conviction could not be sustained in regard to similar actions by newsmen in the United States? Rigorous logic would dictate that the convictions could be sustained only by holding that the first amendment is not applicable to the treaty power. What the courts would do can be only be a guess, conditioned heavily by the existing word situation including the climate of opinion of the time. More probable than not, there would result long opinions, liberally interlaced with Latin quotations, ending with the observation that it thus becomes clear that defendants cannot justly be heard to complain when the treaty resulted in more freedom for them, as they admit, than they enjoyed before the treaty became effective.⁶⁴

Another possible difficulty for the future involves the question of constitutional limitations *vis-à-vis* the feasibility of an international criminal court. The fifth amendment admonishes that, excepting the military services, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Article III, section 2, clause 3 of the Constitution provides that, excepting impeachments, all crimes shall be tried by jury, and that such trials, when the offense is committed within a state, shall be held in the state where they were committed. The sixth amendment strengthens this provision. A hypothetical treaty provides that, for certain enumerated crimes wherever committed, the defendant shall be brought to trial as a result of the international prosecutor's "information," that the trial shall be without jury, and that it shall be held in Geneva. A constitutional treaty?

One's first reaction is to reply negatively, particularly if the offense is committed within the United States. No exceptions are indicated in the constitutional prohibitions, certainly not for civilians. The words seem absolute. But, even in the absence of civilians. The words seem absolute. But, even in the absence of treaty, the prohibitions in the literal sense have by no means always prevented convictions. Without regard to the constitutional provision for suspension of *habeas corpus*, convictions by military commissions during the Civil War were upheld by the Supreme Court.⁶⁵ Much later, in 1942, the Supreme Court upheld convictions of "persons" by military commission.⁶⁶ The Court said that the original purpose of article III, section 2 was not to enlarge the then existing right to jury trial, but to preserve jury trial only "in all those cases in which it had been recognized by the common law and in all cases of a like nature."⁶⁷ Based on the opinion, this inference seems easily to follow. Based crimes would involve a new body of law which would not be of "a like nature," and therefore jury trial would not be required as a matter of constitutionality.⁶⁸ Based on the opinion, this inference seems easily to follow. Based on the literal words of the Constitution, it is strained.

There is, however, another approach by which the same conclusion is reached; and it has been argued by one who certainly was much respected by the bar throughout the United States—the late Judge John J. Parker. This argument, in essence, goes this way: article III, section 2 and the fifth and sixth amendments have long been held as not applicable to state courts; therefore, the provisions are applicable only to federal courts; therefore, they are not necessarily applicable to *international* courts.⁶⁹ The logic of this approach is

⁶⁴ Perhaps one obtains understanding in these matters by recalling a remark of Justice Holmes: "I always say that I will admit any general proposition that anyone wants to lay down and decide the case either way." 1 HOLMES-LASKI LETTERS; 389, 390 (1953).

⁶⁵ See *Ex parte Vallingham*, 68 U.S. (1 Wallace) 243 (1863). See also *Ex parte Quirin*, 317 U.S. 1, 31 & n. 10 (1942).

⁶⁶ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁶⁷ *Id.* at 39.

⁶⁸ *Hearings on S. J. Res. 130 Before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 2d Sess. 262 (1952).

⁶⁹ Cf. Parker, *An International Criminal Court: The Case For Its Adoption*, 38 A.B.J. 641 (1952). For whatever it may be worth, however, it was Judge Parker who at about the same time declared an executive agreement invalid. *United States v. Capps*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

perhaps no more impeccable than that of the previous approach, but on more than one occasion eminent authorities have pointed out that logic has not been the sole or even most important pathway of the law. One may refer again to *Reid v. Covert*⁷⁰ for dicta which may be read as conflicting with the above theories, but a treaty was not at issue in that case, and neither did the case involve a trial in an international court. Perhaps to belabor a point previously stressed, and in spite of the author's or others' current opinions, the constitutionality of an international criminal court may be sustained in the future by the reliance on no other constitutional and judicial resources than those presently available.

Another example of a possible problem of the future is related to the question of whether an international arms control treaty could be enforced in view of the constitutional prohibitions regarding search and seizure. The fourth amendment prohibits "unreasonable" searches and seizures, and seems to say that not even "reasonable" searches and seizures shall be carried out except under warrant based upon probable cause, etc. Although this prohibition seems not quite so unequivocal as, for example, the right to trial by jury previously discussed, it does, nevertheless, appear virtually absolute *in vacuo*. Entirely exclusive of the existence of a treaty touching on the subject, many questions in the decisions have arisen in the past. They include the approval of use by federal officials of evidence obtained by *private* parties as a result of search and seizure without warrant (stolen evidence);⁷¹ and they include the approval of the use by federal officials of evidence obtained by *state* officials as a result of search and seizure without warrant.⁷² In other words, methods have been used legally "to get around" the prohibition in cases solely in the domestic field, and in cases where the crucial factor was the obtaining of evidence to convict for criminal offenses.

In the case of an effective treaty to provide for inspection in order that forbidden nuclear materials may be discovered, it may or may not provide for punishment of private parties for violation of the treaty provisions. If it provided for punishment, then the admissibility of evidence seized without warrant *may* be disallowed in a federal court if the seizure were by *federal* officers. Admissibility in an *international* court may be another matter; or admissibility in a federal court of evidence so seized by *international* officers may likewise be another matter. But the admissibility of evidence, or conviction of violators, would not be the critical factor as to the effectiveness of a nuclear-inspection agreement.

Prosecution and conviction of private parties for the possession of nuclear matter would doubtless be helpful as a deterrent to treaty violation, but the crucial factor in implementing a nuclear-inspection agreement would be *discovery and seizure of the nuclear material itself*. Prosecution of the illegal possessor may well be viewed as an entirely secondary matter. As a result of Geiger counter indications, for example, forceful entry and seizure may follow without any further action to punish the offender, and this may be all that is required to carry out the treaty satisfactorily. If no attempt is made to prosecute the offending possessor, it is doubtful that he would be anxious to attempt to bring litigation against the inspection team, if he were a guilty possessor, either in a civil or criminal action. If he were innocent, the Geiger counter having been activated by non-nuclear materials as an example, he may well be provided with an action under Court of Claims process in the case of property damage. In either event, the activities of the inspection team would be effective.

At least until recently, a more difficult question would seem to be whether an individual could be punished for refusal to allow entrance to his property, or for forcefully resisting entrance, by an inspection team without warrant. As to the refusal of entrance to a health inspector who wished to enter to inspect for rats, the Supreme Court in a five-to-four decision upheld conviction for refusal,⁷³ and one of the main reasons for affirming conviction was that the case

⁷⁰ 354 U.S. 1 (1957).

⁷¹ *Burdeau v. McDowell*, 256 U.S. 465 (1921).

⁷² *Cf. Kohn, Admissibility in Federal Courts of Evidence Illegally Seized by State Officers*, 1959 WASH. U.L.Q. 229.

⁷³ *Frank v. Maryland*, 359 U.S. 360 (1959). *Cf. HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW* (1958). Although published prior to the *Frank* case, the Henkin study is very comprehensive, dealing with many factors of arms agreement enforcement in addition to that of search and seizure. Among other conclusions: "The Second Amendment . . . confers no absolute right to bear arms." *Id.* at 38.

did not involve search for evidence for a criminal prosecution, but involved a search to protect the minimum community standards of health and well-being. Certainly the activities of a nuclear inspection team would also be viewed as involving community well-being, and in all probability to a higher degree than the activities of a health inspector looking for rats. There is some slight difficulty here because this was a state rather than a federal search, and involves the rather nebulous area of whether the fourth amendment is incorporated in the fourteenth. The majority opinion, as viewed by Justice Whitaker in a concurring opinion,⁷⁴ did view the fourth as part of the fourteenth, thus resulting in the proposition that such a conviction would also be upheld in the federal jurisdiction. It thus becomes apparent that the fourth amendment would not prevent the effective enforcement of a treaty providing for inspection teams to search for unauthorized nuclear material.

It seems only a short while ago that it would have been fantastic to think of searching for nuclear materials or atomic devices that may be in the possession of *private* parties. The production of the first atomic bomb was so astronomically expensive that it could not be easily conceived that any entity other than a government could produce one—and the government of a very rich nation at that. It is apparently true, however, that officials of the Atomic Energy Commission were several years ago apprehensive that a simple method of producing atomic bombs might be discovered. One scientist was reported as saying that "one of the things which gives us nightmares is that one of these days someone will stumble on a simple method of making atomic bombs in the bathtub."⁷⁵ Press reports now indicate that some such thing has virtually come about. A West German scientist is supposed to have perfected a small machine which, "as soon as it can be industrially produced, will enable any country, at relatively small cost, to provide itself with as many atomic weapons as it wishes. . . . The West German scientist is selling his invention to all those who wish it."⁷⁶

Whether or not this report is literally true⁷⁷ does not alter the probability of such a development in the near future, and thus the complexities of the Space Age grow larger. It may well eventuate that the nation will have to institute something in the nature of nuclear-inspection teams by legislation without regard to international agreement. Furthermore, the foregoing discussion pertains only to some of the constitutional aspects of the problem. It must be emphasized that no inference should be drawn to the effect that a treaty on limitation and control of nuclear devices can be negotiated or ratified; and no inference should be drawn to the effect that such an agreement could be drafted that would be satisfactory within the complex of military and technological limitations and possibilities. The effectiveness of even such proposals as the "open skies" plan is highly doubtful.⁷⁸

IV.

In this paper examples of constitutional limitations as affecting international agreements in the Space Age have been emphasized only in regard to the treaty power, exercised by the President with the approval of two-thirds of the Senators present.⁷⁹ Nothing said has been intended generally to apply to agreements made by the President under his own constitutional powers, nor to those made by the President as authorized by a simple majority of the Congress exercising its delegated and implied powers. In some situations the limi-

⁷⁴ *Frank v. Maryland*, 359 U.S. 360, 373 (1959) (concurring opinion). In the very recent case, *Mapp v. Ohio*, 364 U.S. 868 (1961), the Supreme Court by a 5 to 3 decision made the Fourth Amendment's search and seizure requirements applicable to the states, reversing *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁷⁵ McGill, *The Passing Scene*, *Evening Star* (Washington, D.C.), Oct. 31, 1960, p. A-10, col. 6.

⁷⁶ *Ibid.*

⁷⁷ In a press release of December 14, 1960, the Atomic Energy Commission may have been referring to this technique when it spoke of the "gas centrifuge" technique, saying that this process was not cheap and that it would take even a highly advanced nation an estimated eight years to produce an atomic weapon by this method. But in a television interview on December 18, 1960, the Chairman of the Atomic Energy Commission indicated that Israel was well on the way to becoming a nuclear power.

⁷⁸ For a lucid exposition of the strategic, technological and practical aspects of the dilemma, cf. Wohlstetter, *The Delicate Balance of Terror*, 1959 FOR. AFF. 211-34. Cf. also *Arms Control*, Daedalus, Fall, 1960 (Journal of the American Academy of Arts and Sciences).

⁷⁹ U.S. CONST. art. II, § 2, cl. 2.

tations on agreements other than treaties are the same as those applicable to treaties; in other situations limitations apply to agreements which would not apply to treaties. As to details, the constitutional differences between these three types of international agreements rest on such complex variables as to dictate that the better part of valor is to say nothing of the subject unless much more is to be said than is possible here.⁸⁰

One power of the Congress, virtually dormant since the federal government's existence,⁸¹ may deserve having attention called to it, however, even if only briefly. This is the power given to Congress by article I, section 8 "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." The researches of the writer have revealed very little in the way of any explicit understanding by the founding fathers of the extent of the power thus delegated. The debates in the Constitutional and Ratifying Conventions hardly ever recorded a mention of the power, and when referred to, the reference comes down to today shrouded in vagueness. Monographs on the subject do not attempt to deduce exactness as to what was meant.⁸² Taken in its literal sense, the power to "define and punish . . . Offences against the Law of Nations" is a vast power indeed. True, one may argue that this "definition" may mean only *selection* of certain offenses from the broad field of common international law. Intermediately, it may be argued that "definition" is confined to *description* of offenses involving direct contact between persons of different nations. Or by broadest construction it may be argued that "definition" of an offense against international law means that Congress can define whatever act it sees fit as an offense against international law, and provide punishment for that act. Under this last approach it could define as such offenses possession of nuclear material, lynching or attacking a foreign national, discrimination by state officials against foreign nationals (as in discriminatory land ownership, inheritance, or practice of professions), or genocide. The list of possibilities can, of course, be extended much farther. By such a broad interpretation, particularly in connection with the other delegated powers of Congress, the treaty power might eventually come to be an un-needed provision, with approval of all "treaties" consummated by simple act of Congress.

If one should aver that the founding fathers would twirl in their graves if they knew that such a construction of the international law clause were adopted in, say, 1975, would not one have to say that they were already rapidly twirling prior to 1961? Would they have dreamed that Congress would some day view it as necessary and constitutional to appropriate funds blindly, in unknown amounts, to staff a large intelligence operation? Would they have dreamed that Congress would authorize the executive to investigate the loyalty and trustworthiness of Congressmen and refuse "security" clearances to Congressmen to inspect military installations? Would they have dreamed that Congress would authorize the President in advance to make "war"? If these and many other developments are such as would astound the founders as to what may be done under the Constitution, why should Americans today think they are to be immune to constitutional developments which to them are astounding?

The fact is, of course, that were the Constitution not flexible, including the prohibitions, the Constitution would have perished long ago. The adjectives are not important. It may be called flexible or vague or ambiguous or self-contradictory. One may speak of interpreting it broadly or loosely, of twisting or perverting its words. All this may be said, and still it may be replied that it's a *constitution* that is being expounded, that the people may reverse the interpretations if they dare. If they do not dare to do so during the cataclysmic days of the early Space Age, and even if the language of the Constitution were virtually turned inside out, still the ideal or the hope or the myth of rep-

⁸⁰ This complex problem is the principal subject of the present author's *TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES: THEIR SEPARATE ROLES AND LIMITATIONS* (1960).

⁸¹ Mainly used only to provide punishment for the counterfeiting of foreign nations' currency.

⁸² Cf. PERGLER, *JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES* 222 (1928). In a long article by Dumbauld, *John Marshall and the Law of Nations*, there is not a word on the international law clause of the Constitution. The article was prepared for the John Marshall symposium issue 104 U. PA. L. REV. 38 (1955), and is reprinted in *THE MARSHALL READER* 176 (Surrency ed. 1955).

representative government and popular sovereignty is maintained. Meanwhile the habit of reference to a fundamental law shall have been practiced, even if the practice includes some strange yet realistically required semantics.

If the citizens of the United States fail to flourish or survive in the Space Age, it will be the forces of technology or lack of wisdom, a strong enemy or moral degradation, mis-directed energy or just misfortune, or a combination of all of these which will be responsible. The Constitution will be blameless.

Professor MILLER. Dr. Byrd, I wonder if you would comment, please, on your conception of the power of the Congress to enact a bill such as under discussion, S.3475, which requires an executive agreement to be submitted to Congress for its approval.

Dr. BYRD. If I understand the question, meaning whether or not the Congress has the authority to enact such a bill?

Professor MILLER. Does Congress have the constitutional power, in your judgment, to do this?

Dr. BYRD. I think with regard to the authority, that it has the constitutional authority to enact.

Where some of those international agreements would involve a subject—there is no definition of the executive agreement or international agreement—that some of those, if especially involved would be the presidential agreement alone, that would be, I am almost persuaded to say, unconstitutional. But at least I would say irrelevant.

Professor MILLER. Would you expand on that and give us some examples of what you have in mind of this type of agreement?

I think the recognition of foreign governments, for example, might be implied from the power to nominate and appoint ambassadors. You also said a moment ago, in response to Senator Ervin, that you did not believe there was such a thing as inherent powers. Now, would you tell me what types of agreements fall within the category then of the international agreements and the President's power?

Dr. BYRD. Well, I certainly will not be exhaustive.

Professor MILLER. No; give three or four.

Dr. BYRD. One example, you also mentioned, the recognition power.

Professor MILLER. That could be implied, I take it, from the terms of the Constitution.

Dr. BYRD. Yes. Furthermore, as Commander in Chief of the Armed Forces, meaning the Armed Forces in existence, remembering that the Congress has limited itself to appropriating funds for 2 years for the military, to try to prevent military establishment.

Professor MILLER. What type of agreement do you have in mind?

Dr. BYRD. The Commander in Chief, in the exercise of his plenary discretion, ordering powers of the military, may say in a table conversation with a foreign chief of state, that in the event such and such occurs, "I will send 10,000 troops."

Professor MILLER. Are you suggesting, then, that this is the type of presidential agreement which Congress cannot meet at all under constitutional power?

Dr. BYRD. Yes. It cannot meet, as I understand the word "meet."

Professor MILLER. And you base that on the notion of plenary power in the Executive?

Dr. BYRD. When the power of the Commander in Chief is given to one person, yes. I call that plenary power.

Professor MILLER. The question is, of course, whether the power over the Armed Forces includes the power of Congress to raise and support armies.

Dr. BYRD. Absolutely.

Professor MILLER. So you imply there, at least, a shared power. You are not suggesting the power of the President is absolute over the military forces, are you?

Dr. BYRD. Not 50,000 troops, if I understand you correctly in terms of regulations. For example, the "articles of war," they used to call it, that the Constitution specifically authorizes the Congress—

Professor MILLER. Are you suggesting that in certain agreements, such as the commitment of, say, 50,000 troops to a certain area of the world by the President, that the Congress could have nothing to do about it whatsoever?

Dr. BYRD. Not 50,000 troops, if I understand you correctly—

Professor MILLER. That is correct.

Dr. BYRD. That are already in existence?

Professor MILLER. Yes.

Dr. BYRD. That is right.

Professor MILLER. The Congress has no power whatever?

Dr. BYRD. Not to stop the exercise regarding those 50,000 troops, no sir.

Professor MILLER. Suppose they cut off the funds, what would happen then?

Dr. BYRD. That is exactly what I said to the Senator. If they cut off totally, there will be pretty soon no 50,000 troops.

Professor MILLER. Then, you are arguing some sort of notion of the power that is not inherent. It is a very, very strong implication from a Commander in Chief power that there are certainly agreements Congress cannot touch.

Dr. BYRD. Yes, but that is not inherent.

Professor MILLER. Pardon?

Dr. BYRD. But that is not inherent. There is no argument for inherent power.

Professor MILLER. How would you label it?

Dr. BYRD. I already said, the President has plenary power, meaning absolute power.

Professor MILLER. That is the question.

Dr. BYRD. Over the deployment of the military forces in existence.

Professor MILLER. But what do you base that on?

Dr. BYRD. The Commander in Chief clause.

Professor MILLER. What is your basis for saying he has absolute power?

Dr. BYRD. Because, when you have absolute military power as a Commander in Chief there is no limitation upon those powers.

Professor MILLER. But that is the question, sir. Give us some reasons for it.

Dr. BYRD. Then you are asking me for constitutional history regarding the writing of that article?

Professor MILLER. Are you basing it on the constitutional practice of past Presidents, is that it, or what the Founding Fathers said?

Dr. BYRD. What the Founding Fathers said, yes. The Federalist Papers put it one place, with regard to the necessity of the President having the power of Commander in Chief.

It is true, earlier in testimony this afternoon, in your exchange with Senator Fulbright, Senator, you thought that the one reasonable inference would be the difference between his power with regard to offensive military action on the one hand and defensive military action on the other. I am not arguing just out of reasonable inference. I am arguing the Constitution does not say that.

Senator ERVIN. If you pardon me, what do you do with this provision in the Constitution. I believe it is article I, section 8, which says Congress shall have the power to make rules for the Government and regulation of the land and naval forces, and for calling forth the militia—I do not believe it is confined to militia—calling forth the armed services to enforce the laws of the Union, to suppress insurrections and repel invasions.

Dr. BYRD. Well, there are two different functions described, as I understand it. One is the power of Congress to provide the rules and regulations that shall govern the military forces, and it does not have to do with deployment of those forces, but rather, as I indicated earlier, such as the old Uniform Code of Military Justice. I believe they are pertaining to the method of courts-martial, general courts-martial, special court-martial, powers of the Commander under certain conditions, what the Commander can have, what authority regarding court-martial and many similar vast number of regulations. But as with regard to the article governing the military, but not having to do with the Commander in Chief's prerogative of deployment, telling them where to go.

Senator ERVIN. I do not know whether we differ or not. It seems to me that the President undoubtedly has power, and in fact it is his constitutional duty as Commander in Chief to use whatever armed forces are in existence to repel an invasion. But I would question seriously whether the President has the power to take 50,000 troops and send them outside of the United States to engage in combat abroad.

Dr. BYRD. Well, with all due respect, Senator—

Professor MILLER. Absolutely. That is my position.

Dr. BYRD (continuing). You can challenge that. But you know as well as I do it has been done and done with, I suppose, persuasiveness with regard to the Congress, because as I indicated in my statement, they continue to appropriate the funds that will allow him to continue to do that.

Professor MILLER. With all due respect, sir, it has not been done that often, that number of troops. There have been one or two instances, both of which are relatively small. There is nothing on the order of magnitude of Vietnam, historically, other than Korea. Is there, to your knowledge?

Dr. BYRD. No.

Professor MILLER. So we do not have many examples. It seems to me you are suggesting something very similar to inherent powers.

Dr. BYRD. It seems to me, sir, I am not. I totally reject inherent-power theory. But, for example, sir, the Constitution gives authority

to the Congress to do certain things. For example, whether or not a member should be expelled. I call that a plenary power, not an inherent power, because the Constitution has specifically provided for it. But it is plenary.

When I say plenary, I mean not subject to anybody else's approval or disapproval.

Professor MILLER. Well, Dr. Byrd, you are not suggesting the President or the Congress is not subject to Supreme Court review, are you?

Dr. BYRD. Yes.

Professor MILLER. You are?

Dr. BYRD. Yes.

Professor MILLER. That the Supreme Court has no jurisdiction to review acts of Congress?

Dr. BYRD. You did not ask me that. You asked me if the Supreme Court has authority over the Congress or the President, and that is different from reviewing of acts of Congress.

Professor MILLER. But certainly, both the executive and the legislative are subject to judicial review?

Dr. BYRD. Well, I would just answer you this way, if I may. The Supreme Court is subject to congressional review.

Professor MILLER. Well, that may well be as a matter of checks and balances and it might be very proper, but it simply means, however, that each branch is subject to review by other branches to some extent.

Dr. BYRD. This goes on all the time, the review bit.

Professor MILLER. But the question, sir, is this: what powers are plenary powers? Give me even an article I, section 8 power of Congress to regulate commerce among the States. It is still subject to Supreme Court determination on whether or not a given statute falls within that power.

Dr. BYRD. Well, I thought you were going to say it is still subject to approval by the President, and if he vetoes it, approval by Congress over the veto.

Professor MILLER. Certainly.

Dr. BYRD. I would not say that is a plenary power. I would not take that as an example of plenary power.

Professor MILLER. What is an example of plenary power of Congress?

Dr. BYRD. Expelling a member.

Professor MILLER. The other question, of course, I think is the relationship of *Powell v. McCormack*, which may have some bearing on this, of the power of Congress. At least the Court did intervene and make a decision with respect to the late Adam Clayton Powell.

Dr. BYRD. Yes, it did.

Professor MILLER. So it is subject to review. Now, whether or not it is still an unsettled question—

Dr. BYRD. It now will continue to be, with the death of the late Congressman.

Professor MILLER. So we have even then, I think at best, on several questions, not a settled question—

Dr. BYRD. What subject?

Professor MILLER. On the expulsion. I do not think you can cite a case, can you?

Dr. BYRD. I can cite the constitutional language which does not provide any other agency will have any approval with regard to that.

Professor MILLER. So can Speaker McCormack take the Supreme Court ruling.

Let me turn to another area, if I might. This goes to the power of Congress. I think perhaps we could discuss this at length. I agree with Senator Ervin's interpretation quite strongly, as I understand the purport of yours. I am interested now in the policy. I am quite sure that future witnesses before this subcommittee are going to make the point that submission of executive agreements of any type to the Congress for 60 days will work an intolerable burden upon the conduct of foreign relations. I wonder if you could give us your views.

Dr. BYRD. I am not going to make that——

Professor MILLER. Would you comment on that statement?

Dr. BYRD. I will comment on it. Let me say to you, I have been awfully busy lately and I wish I had had more time to prepare for this testimony. I arrived in town last night. And where I live, I do not have a Library of Congress available. I live up in the mountains of West Virginia now.

But I will suggest this to you: you check me out, if you may, someone may. A few years ago when I was working on the subject, my almost certain memory is that there was a statute at large which said "all executive agreements shall be approved by Congress."

Now, whether it has been under recodification, taken out or repealed in some other fashion, I do not know. The point I am making, I think that it is in the statutes already. And this leads me to the question——

Professor MILLER. Do you infer from that—if you are correct, and I am not sure whether you are or not—that all executive agreements which have not been submitted to Congress and have not been approved are invalid or illegal?

Dr. BYRD. No sir. I do not infer that.

Professor MILLER. Then, this statute is just a mere meaningless gesture?

Dr. BYRD. Exactly. I will point this out and say if I am right in my memory, that this statute—and I think it was 1919 that it was passed—this statute is ineffectual. It is a dead letter. It has not been implemented. It has not been carried out.

Now, there has been, to my knowledge, no commentary or struggle over why it has not been implemented or carried out, but I would say the same thing with regard to the—I hope you understand me. I am not arguing for the executive branch or Congress or anyone else. I am trying to say I have no bones to pick with any one of the branches, but I very greatly do sympathize with the purposes indicated by these resolutions. What I am speaking about is whether or not they are going to be effectual, whether they will work, and in my judgment, similar things in the past have not worked and these will not either.

Professor MILLER. Will they hamper the Executive, Dr. Byrd?

Dr. BYRD. From the public relations point of view, they will hamper him. But that is a roundabout way. I do not believe when—I do not know what you mean when you say hamper them, but it will go in that direction.

Professor MILLER. There will be severe intrusion or intervention up the Executive prerogatives.

Dr. BYRD. I do not believe it will be. I do not think it is a real case of that.

Professor MILLER. Have you had a chance to read the Senator's bill?

Dr. BYRD. Yes, I read it the night before I left home.

Professor MILLER. Would you care to comment on it in general, as to whether you think it is driving in the right direction or not?

Dr. BYRD. The concurrent resolution device, since there is not a definition there between—as the Senator preceding me spoke of—important or unimportant, significant or insignificant executive agreement, and no definition with regard to whether it is written or verbal, I think that if it were all inclusive as the language seems to be and if it were faithfully carried out, which I do not believe it will be, but if it were, the Congress will be interfering with Executive prerogatives.

They would be approved by silence automatically, because you could not get to all of them. And that puts you, it seems to me, from a Constitutional and psychological point, in a worse position than before, because it would be argued you did not object during 60 days. That makes it, according to your own laws, you approved it, so don't come back to us with any of your problems.

From that point of view, I think it would be ineffective and maybe worsen the situation.

Professor MILLER. I have no further questions.

Senator ERVIN. As I understand your position, I think that proposals like my proposal and the proposal of Senator Case and others that are seeking what you call an automatic device, regardless of whether they are constitutional or not, are unwise. They are ineffective.

Dr. BYRD. I would say unwise—if you mean it would be unwise to rely on what might be accorded automatic devices to beat the problem. That is correct.

Senator ERVIN. Yes. I am frank to say that I cannot find very many powers that the President can exercise himself in the field of foreign relations. I recognize the one about recognizing foreign nations and, like Professor Miller, I think that is implied from other provisions of the Constitution. The way I take it, the President has power as Commander in Chief to direct how the Armed Forces will be employed when he has been authorized by declaration of war to employ those in combat with a foreign enemy, what I called a defensive war, I think he has the right to direct how they should be employed in resisting an invasion.

Despite the fact that Presidents have used the Armed Forces to invade Republics on many occasions, I have always maintained that although we have had murder and larceny in every generation, that fact has not made murder meritorious or larceny legal. I think the Supreme Court sustains that in the *Steel Seizure* case. It says it does

not matter how many times the Presidents have acted unconstitutionally in the past, it does not set aside the fact the President could not act in that case without authority from Congress.

Dr. BYRD. Well, I certainly agree with what the Supreme Court said in the *Steel* decision case, yes.

Senator ERVIN. It says here in section 8 of article I, "The Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It would seem to me that would give Congress power in most cases to regulate how the President selects the size of the power the Constitution gives them.

Dr. BYRD. I think in most cases you are right. But where the Constitution gives the President direct power as Commander in Chief, then I think it is a constitutional question that is not so easily reconciled, and I do not think it will be reconciled, because I do not think the Supreme Court is going to decide that.

Senator ERVIN. They have not thus far, of course, but it seems to me when you say he is Commander in Chief of the Army and Navy Forces, and the militia when called into service for the United States, that that is subject to the other provisions of the Constitution in respect to power of Congress to declare war and in respect to the power of the President to repel invasion, but I do not believe that gives him the power to order, even though it has been exercised on occasion by Presidents, the power to send our forces abroad without the consent of Congress, to maintain law and order in foreign nations.

Dr. BYRD. It is a difference of view as to what the Commander in Chief means.

Senator ERVIN. Oh, yes.

Dr. BYRD. I repeat, I think it applies to plenary power, absolute power as to deployment over those forces in existence, but the forces in existence were put in existence by the Congress and they are subject to be reduced by the Congress or a specific provision by appropriation, that money may not be spent in a specific area. And in that way, you do not have troops, for example, to go to a specific area, so the President cannot send troops he did not have for the area.

Senator ERVIN. I think Congress can regulate those matters to some considerable degree. If I recall correctly, just before the beginning of the Second World War, we passed a draft law and provided in the law that no drafted man could be sent to fight outside of the borders of the country.

Dr. BYRD. No, sir. I think I am familiar with that. It says: "No American may be sent to participate in a foreign war." Right? You know what the President said? "Now that there has been an attack on Pearl Harbor, it is no longer a foreign war, it is a domestic war."

Senator ERVIN. You may be right in your recollection of that. I wouldn't gainsay.

Dr. BYRD. Just one word can be twisted, you understand, and make an awful lot of difference. The executive branch, as I said, has hundreds of staff people daily with their time to play the role. You do not have the time.

Senator ERVIN. But I would hate to think about the only effective power Congress has in this field is the appropriation power.

Dr. BYRD. Why, Senator?

Senator ERVIN. Because the President can do what he pleases, and all along there is no way to restrain his activities. He can go out and make any kind of agreement with any other country, and the Congress cannot do anything about it except withhold funds after his error is discovered.

Dr. BYRD. That is doing a lot about it.

Senator ERVIN. Well, it is locking the stable door long after the horse—

Dr. BYRD. I mentioned the horse a moment ago. I may say with regard to that—don't misunderstand me. I am for essentially what your purposes are. I was against the Vietnamese war a long time before a lot of other people. When I ran for Congress in 1966, 85 per cent of the people, according to the public opinion polls, were for the Vietnam invasion or sending troops to Vietnam. And, of course, I probably made a mistake saying I am against that when only 15 percent of the people said they agreed with me. So I am not a Johnny-come-lately; I was too early on that, politically speaking.

So it is immaterial to me though, with regard to what I told you, what my views are on that. I was against the Vietnam situation way back then. But it is a matter of my being against the wisdom of the President, not a matter of my being against the power of the President. I think there is a distinction we must pay much more attention to than we have.

Senator ERVIN. We have a North Carolina expression: "He can do about it like he damn pleases." If you excuse the North Carolina expression.

Dr. BYRD. I think you get the point. As long as you let him.

Senator ERVIN. That is the reason I think the Founding Fathers put that treaty-making provision in article II, section 2. They meant what they said.

Dr. BYRD. But, Senator, James Madison was one of the architects of the Constitution and that provision. One of the very first international agreements was other than a treaty. It was borrowing a very large sum of money from Holland and legislation passed, and along with the same thing, the same Jay Treaty debate that went on for 65 days with nothing else taken up but just that one subject in the House here.

Madison had many occasions publicly to comment on that, but only in writing to Thomas Jefferson by letter, saying it is a very—not quoting exactly—it is a very interesting thing to note that the agreement with Holland on flooring was consummated solely with the power of the Congress and the Senate not having its treaty power operating. He said this in a letter to Jefferson.

Senator ERVIN. I think that was in the field of our legislative power.

Dr. BYRD. But it is international agreement.

Senator ERVIN. But it was legislatively authorized.

Dr. BYRD. Absolutely. Not treaty.

Senator ERVIN. Yes. So I would think that Congress has legislative power and it can do the same thing by legislative method that can be done by the treaty.

Dr. BYRD. Many things.

Senator ERVIN. But I cannot go along with any theory the President can go out and do it. He has to have a legislative act authorizing it, or he has got to have a treaty.

Dr. BYRD. I am sure you would agree with the concept of reciprocal trade agreement. It gives authority to the President beforehand.

Senator ERVIN. Yes.

Dr. BYRD. And most of the important, if I may use the term, international and other, have been under such legislation by far.

Senator ERVIN. I do not have any trouble with that.

Dr. BYRD. I know.

Senator ERVIN. In other words, you have a prior case in that Congress gave the power by a legislative act, authorizing the treaty in advance.

Dr. BYRD. Yes.

Senator ERVIN. But it was a legislative act which gave the authority. I have no trouble with the legislative act and no trouble with the treaty doing the same thing by either method, but I do not think the President can pass a law and I do not think he can make an executive agreement have the force of a treaty.

Dr. BYRD. You mean operating as law upon a citizen of the United States?

Senator ERVIN. Yes.

Dr. BYRD. I agree with that, except that in his role as Commander in Chief, you might as well call it a law if he says you go there, you know. Whether it is law or an order, I would advise you to go, if you are in the service.

Senator ERVIN. We are certainly greatly indebted to you for your appearance here.

Dr. BYRD. It has been a pleasure to be here.

Senator ERVIN. I will try and get your book and read it the first chance I get.

Dr. BYRD. It is out of print, but I am sure you can get it from the Library of Congress.

Senator ERVIN. I am sure I can. In fact, a member of the staff has already checked it out [indicating]. I am sorry it is out of print.

Thank you very much, Dr. Byrd.

The subcommittee will stand in recess until 10 a.m. tomorrow, when it will convene in room 114, New Senate Office Building.

(Whereupon, at 5 p.m. the subcommittee recessed, to reconvene at 10 a.m. the next morning.)

BIOGRAPHICAL INFORMATION—ELBERT M. BYRD, JR.

Current position: Self Employed: (1) Resort owner and operator; (2) Consultant and Visiting Professor; (3) Announcer, WMTD Radio, Hinton, W. Va.

I. PERSONAL DATA

Date of birth: December 26, 1923

Place of birth: Wytheville, Virginia

Marital status: Married, 3 children (Born 1946, 1949, and 1963).

II. EDUCATION

B. S. in Social Sciences, American University, Washington, D. C., June, 1953; major in International Relations and Organization.

M. A., American University, Washington, D. C., June 1954, major in International Relations and Organization.

Ph.D., American University, Washington, D. C., June 1959; major in Government. (Graduate training, Johns Hopkins University, Baltimore, Maryland, in political science. 1954-1955. Also Intelligence training, Strategic Intelligence School, Dept. of the Army, 1949; part-time attendance University of Maryland Law School, Sept., 1959 to June, 1960).

III. EXPERIENCE IN HIGHER EDUCATION

Johns Hopkins University. (Part-time Instructor 1954-1955 (Graduate Student). Course taught: American Government. University of Maryland. Instructor, Assistant 1957-1971 Professor and Assoc. Professor

Courses taught: American Government. International Law, International Relations, Constitutional Law, Political Theory, State and Local Government, Administration of Justice, Principles of Government and Politics; Seminars in Political Theory; Problems of American Government; Bibliography of Government and Politics; and American Political Institutions.

IV. EXPERIENCE OTHER THAN IN HIGHER EDUCATION

Military service from December 1940 to April 1951 during which time assignments were principally in tactical and strategic intelligence. Promotion to first sergeant received at age of 18, and battle field commission received at age of 19. Service included assignment as chief intelligence specialist of Air University Intelligence division, and embassy assignment as member of military attache office. Legislative Assistant to Congressman Carlton R. Sickles, 1966.

V. PUBLICATIONS, PATENTS, AND OTHER CREATIVE EFFORTS

Military publication included a series of unclassified intelligence studies called *The Intelligence Bulletin*, under sponsorship of the Air University, distributed Air Force wide from 1947 to 1949; and many classified publications distributed on a need-to-know basis.

Treaties and Executive Agreements in the United States (The Hague: Martinus Nijhoff, 1960).

The Judicial Process in Maryland (College Park: Bureau of Governmental Research, 1961).

"Constitutional Limits on International Agreements in the Space Age," *Northwestern University Law Review*, March-April, 1961.

"Patterns of Local Government," three part series in *The Citizen News*, Riverdale, Maryland, Sept. 28, Oct. 19, and Oct. 26, 1962.

"From Ancient Greece to World Government: The Ageless Problem of Equitable Representation," *Maryland Magazine*, March-April, 1963; *Congressional Record*, May 29, 1963.

"The Role of the Lawyer in the Economic and Social Development of His Country Within the Framework of the Role of Law," *Journal of the International Commission of Jurists* (Geneva), Vol. V, No. 1, Summer 1964 (First Prize essay).

"Toward a New Constitution for Maryland," *Maryland Magazine*, September-October, 1965.

"A Modern Judiciary for Maryland: A Comparative Analysis," *Maryland Municipal News*, August, 1967.

"The Constitutional Basis of Local Government in Maryland," *Maryland Municipal News*, September, 1967.

"Toward a Policy of Arms Displacement," *The Social Studies*, March, 1970.

Several earlier articles written for *The Southwest Virginia Enterprise*, Wytheville, Virginia, appearing on dates of Dec. 20, 1950, Nov. 27, 1953, July 6, 1954, and Oct. 14, 1955.)

VI. PROFESSIONAL ACTIVITIES

Membership: American Political Science Association, Southern Political Science Association, District of Columbia Political Science Association, Partici-

part in activities of National Center for Political Studies; Chairman of panels at Washington Metropolitan Conferences on Politics 1960 and 1963.

VII. HONORS RECEIVED

Membership, Pi Sigma Alpha, honorary Political Science fraternity. Membership, Honor Society, American University. First Prize in International competition for paper on "Role of the Lawyer." (See under publications above).

Grants from University of Maryland Graduate Research Board, 1960 and 1965. Excellence Award, June, 1967 from American Security Council for paper entitled "To Narrow the Preparation Gap: A Training Center for Overseas Business Representatives."

VIII. OTHER ACHIEVEMENTS AND ACTIVITIES

Overseas service, 1943-1945 and 1949-1950.

Awarded Bronze Star Medal (1945).

Participated in the development of the Language and Area Training Program in Arabic Studies, Beirut, Lebanon, 1949-1950.

Faculty Adviser Political Science Club (1957-1962), Pi Sigma Alpha 1962-1965), Young Democratic Club (1961-Present).

Service on G & P 1 Committee; Departmental Curriculum Committee; College Curriculum Committee; Graduate Faculty Committee; Senate Committee on Program, Curricula, and Courses; Department Recruitment and Appointment Committee; College Council Representative.

Graduate Fellowship, John Hopkins University, 1954-1955.

Graduate Assistantship, American University, 1956.

Ran for public office in 1962 and 1964 Maryland primary elections, and 1966; Treasurer, Young Democratic Clubs of Maryland, 1961-1962; Platform Committee Chairman, Young Democratic Clubs of Maryland Convention, 1961; Chairman, Young Democratic Clubs of Maryland Convention, 1961; Chairman, Young Democratic Clubs of Maryland Constitution and By-Laws Committee, 1962-1963; past Treasurer and first Vice President, Young Democratic Club of Prince George's County; President, Young Democratic Club of Prince George's County, 1963; Permanent Parliamentarian, Young Democrats of Maryland, 1963-1967.

President, Fair Representation Committee of Prince George's County, 1962-1963.

Chairman, Committee to Study the Government of Prince George's County, appointed by the Maryland General Assembly, and author of report February, 1963.

Numerous speeches throughout the State of Maryland, sponsored both by the University of Maryland Speakers Bureau, and by political and civic groups.

Guest Lecturer, Industrial College of Armed Forces, August, 1962, 1963, 1964.

Chairman, Policy Committee, Prince George's Democratic Forum, 1965-66.

President, 19th District Democratic Club, Riverdale, Md. 1965-1967.

Observer, Maryland Constitutional Convention, 1967-68.

Chairman, Prince George's Citizens for McCarthy for President, 1968.

Listed in: Men of Science Who's Who in the East, 1968.

**S. 3475—TO HELP PRESERVE THE SEPARATION OF
POWERS AND TO FURTHER THE CONSTITUTIONAL
PREROGATIVES OF CONGRESS BY PROVIDING FOR
CONGRESSIONAL REVIEW OF EXECUTIVE AGREE-
MENTS**

TUESDAY, APRIL 25, 1972

**U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.**

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 1114, New Senate Office Building, Senator Sam J. Ervin (chairman of the subcommittee) presiding.

Present: Senator Ervin (presiding).

Also present: Rufus L. Edmisten, chief counsel and staff director; Joel M. Abramson, minority counsel, and Prof. Arthur S. Miller, consultant.

Senator ERVIN. The subcommittee will come to order.

I am delighted to welcome to the subcommittee as the first witness today, Senator Clifford P. Case, distinguished Senator from New Jersey, who has long been interested in the field which we are exploring and who has made a most substantial contribution toward bringing some order in this area by introducing a bill which the Senate has passed—and I trust the House will pass—which requires the executive branch of the Government to file all of the executive agreements with the Congress so that the Congress can take a look at them and know what is going on in this field.

I think you made a signal contribution to the country by introducing that bill, and I sincerely hope the House will pass it.

We are delighted to have you here, because you have given much study to executive agreements and probably are one of the most knowledgeable men in the country on the importance of some congressional action in this area.

**STATEMENT OF SENATOR CLIFFORD P. CASE, A U.S. SENATOR
FROM THE STATE OF NEW JERSEY**

Senate CASE. Thank you, Mr. Chairman. I am grateful for your introductory comments, and I am even more flattered by the fact that you found the bill in regard to sending up executive agreements to Congress worthy of building upon, and I am happy to be associated with you and other colleagues in this effort which is not—as

anyone who knows you knows and I hope would feel the same way about me—a destructive effort and not an adversary operation but is an effort to restore the kind of balance that our Government ought to have.

Senator ERVIN. Your bill has laid the foundation for and inspires this bill. What we are trying to do is to make our system of shared powers in the foreign relations field work with a maximum amount of efficiency and a minimum amount of injury to the country.

Senator CASE. That is so true. It is something that has, constantly, to be pushed, because there is a tendency—no good man holds a job without trying to make his job the most important, and as he sees it, the most effective. So, it is necessary for the Congress constantly to assert not only its prerogatives but its rights and also its responsibilities in this and other fields, too. But now we are talking about this one.

Just as an aside, if I may: I cannot tell you how pleased and excited I was, and what a deep feeling of satisfaction I got in regard to, if I may be allowed a personal reference, your interest and activity in securing the presence of Peter Flanigan before your subcommittee hearing the judicial nomination. I think this was a terribly important contribution to an attempt to take away some of the layers of isolation that the Presidency has been surrounded with, not so much by the Presidents individually as by the people who work for them.

Senator ERVIN. Yes.

Senator CASE. Your getting Mr. Flanigan up here under the proper circumstances was terribly important, and I am so glad you were able to do it.

Senator ERVIN. Well, thank you. I might state, with respect to this particular bill, of course, that the Subcommittee on the Separation of Powers is interested in the question of separation of powers, and the Foreign Relations Committee is interested in all matters that affect our foreign policies and our foreign affairs.

So, Senator Fulbright and I discussed this matter and recently made an agreement that the Judiciary Committee would study this bill first and then it would be referred to the Foreign Relations Committee. This bill, of course, is sort of a blueprint. I have no idea that it is in its final form, and I hope each committee can make some contribution to in some way make the objectives of the bill effective.

And that is the purpose of our hearings.

Senator CASE. Well, I do understand that. I read Mr. Fulbright's testimony that he presented to you, to your subcommittee, yesterday morning with very great interest, and I think actually we can do things together that we cannot do separately.

Senator ERVIN. Yes.

Senator CASE. Your committee and ours. We have different constituencies in some measure but in this I think we are working definitely toward the same aim and with a spirit of cooperation that I think is essential if Congress is to be an effective proponent of its own position in the Government.

One great thing about the Presidency is its singleness and its ability to attempt to—and again I am not talking as to the Presidents

as individuals but as to the institution—to attempt to divide the Congress and to render it relatively impotent.

And your cooperation with Senator Fulbright, your committee and our committee together, working together, are going to produce, I think, good, excellent, results.

As far as the specifics of the suggestions that Senator Fulbright made, as he said, they were made tentatively because he and I feel this, too, that we should consider all of these things in some depth before we try to get very specific about the approaches. I think his general thought is pretty good.

Senator ERVIN. I thought his suggestions——

Senator CASE. Mr. Chairman, to me, as a member of the Foreign Relations Committee, Senator Fulbright's analysis was very sound. I was not surprised, because our chairman is a very perceptive man.

Senator ERVIN. I thought your suggestion constituted one of the most admirable examples of the advisability of holding hearings and using the specifics as proposed legislation, because he made some extremely thoughtful suggestions on matters which merit the greatest consideration insofar as changes in the phraseology of the bill are concerned.

Senator CASE. I thought so, too, and I am not surprised that they appeal to you, because I know how deeply you study all of these matters.

Mr. Chairman, I have a prepared statement which I will just perhaps run over the high spots of, and, then, if I may, have it inserted in the record in full.

(The prepared statement submitted by Senator Case reads in full as follows:)

STATEMENT OF SENATOR CLIFFORD P. CASE

Mr. Chairman, I was extremely pleased to learn that this subcommittee would be holding hearings on executive agreements and treaties. We on the Foreign Relations Committee have considered pacts with foreign countries on an ad hoc basis, but there has been a pressing need to take a closer look at the basic constitutional questions involved. In this area, the jurisdictions of our two committees overlap.

During the last few years I have spent considerable time trying to deal with the difficulties raised by executive agreements. My efforts have led to some legislative successes, and these, to a large extent, reflected the wise counsel and support I received from the Senator from North Carolina (Mr. Ervin).

Our whole Constitutional system is based on checks and balances. Fearing the concentration of power in one man or even one branch of government the founding fathers wrote a Constitution in which each branch found its authority limited by the other two.

Thus, the Executive was to make treaties with foreign countries, but these treaties were not to have effect until approved by two-thirds of the Senate. In this way, the Executive alone could not involve the country in a foreign entanglement.

Yet the practice has grown increasingly common under the last five presidents for the Executive branch unilaterally to bind the United States in agreements with other countries. The device used has been the so-called executive agreement, but the executive agreement is nowhere mentioned in the Constitution. Under the executive agreement, the United States has been committed to Destroyers-For-Bases, Lend Lease, Korean mercenaries, and Spanish bases. Congress has always been asked to pay the cost of these deals, but we have never been able to exercise our Constitutional responsibility of considering them in advance.

The executive agreement should only be used if the matter under discussion with a foreign country is relatively unimportant. If the United States seeks to increase the size of its embassy in a particular country or arrange an exchange of scholars, there is no need for a treaty to be concluded. In fact, if treaties were used in those minor matters, the whole business of conducting the nation's foreign affairs would be hampered.

I think the real test must be the importance of the agreement. And as Senator Harry Byrd recently stated: "The doubt should be resolved in favor of the legislative process."

There is no question that a mutual defense agreement with another country should be a treaty. I believe the Executive Branch would agree with me on this, although even here there seems to be some dispute. I am thinking of the so-called Thai contingency plan which may or may not have committed the United States to take certain actions to defend Thailand in the event of certain contingencies. While this issue was clouded by Executive secrecy, my view is that this contingency plan legally had no effect without the advice and consent of the Senate, but I am not sure the Thai ever understood this. As a practical matter, an executive agreement can take on a life of its own in the eyes of foreign countries, the American public, and even our own government officials.

Agreements closely related to our country's national security should also be treaties, and I shall list three types which have lately been dealt with, incorrectly I believe, as executive agreements. These are: (1) agreements providing for U.S. military bases abroad; (2) agreements revising or extending arrangements for these military bases; and (3) agreements providing for the storage of nuclear weapons overseas.

There are other important matters such as taxation, extradition, and consular relations which at times should be included in treaties, *but* my primary concern is with questions that touch on our national security, and my list should not be regarded as all inclusive.

The stationing of American troops abroad can lead to a commitment to the host country and ultimately to war. It is simply too important a question, from both a Constitutional and a practical standpoint, to be left to ratification by the stroke of a diplomat's pen.

I have made my position clear in the recent cases of executive agreements concluded with Portugal and Bahrain. In the Portuguese case, the United States "committed" itself to provide Portugal with about \$436 million in assistance and credits in return for a 25 month extension of the use of military bases in the Azores. With Bahrain, we have agreed to pay several hundred thousand dollars in rent for military facilities on that Persian Gulf island.

For the last five months, I have been working to have these two agreements submitted to the Senate. I started out by writing Secretary of State Rogers on December 9, 1971 urging that the Portuguese agreement be put into treaty form. When it became clear that the Administration would not act favorably on my letter, I introduced a resolution, with the co-sponsorship of four other senior Foreign Relations committee members, which called on the Administration to submit the agreement as a treaty. This resolution was later expanded to include the Bahrain agreement, and 30 senators eventually became co-sponsors. On March 3, the Senate passed this Portugal-Bahrain resolution by a vote of 50 to 6. Still in a March 21 letter, the Administration stated that after "serious consideration," it would not submit the agreements to the Senate. Claiming that the agreements "were appropriately concluded as executive agreements," the State Department's only reaction to the overwhelming vote on my resolution was to "have noted the sense of the Senate."

I understand full well that a Senate resolution is not legally binding, so the State Department technically has the right only to "note it." Yet I must say that the attitude of the Department was most unwise and shortsighted in the extreme.

At that point I was faced with two choices: Either I could let the matter drop—content to have a resolution with my name on it passed by the Senate—or I could at least try to take further action. I chose the latter course because I believed a fundamental Constitutional question was at stake, and on April 4 I introduced a bill (S. 3447) which would cut off all the implementing provisions of the Portuguese and Bahrain agreements until they are submitted to the Senate as treaties.

The Senate cannot compel the Executive to submit the agreements, but at the same time the Senate does not have to appropriate any money to pay for the costs of the agreements. The pursestrings of the appropriations process are Congress' ultimate weapon and one we should use, albeit judiciously, in foreign as well as domestic affairs.

Some commentators have mentioned my actions as part of what is known as the re-emergence of Congress in foreign affairs. That is a correct interpretation as far as it goes. But I would look at it more as an effort to return to the letter and the intent of the Constitution. I am not at all interested in an aggrandizement of Senatorial power. What I am interested in is preventing the executive branch from committing our country to significant and often irrevocable courses of action without approval of the Congress and ultimately the people.

Checks and balances are what our system is all about.

Senator CASE. Everything that we are doing is based upon the understanding of our constitutional system as one of checks and balances. This is such an old conception, and one to which we are accustomed to pay lipservice, not thinking whether we really mean it. We should mean it, for it is terribly important. It means preventing the concentration of power in one man or in one branch of government and it does not mean it as a matter of scenery, it does not mean it as a matter of logical paper-organization structure; it means it in fact.

How this carries with it, of course, a lot of agony. It is frustrating to a President, it is frustrating to you and me, if we cannot have our own way after we have worked hard and want to do something. We see people who object to us only as obstructionists and, naturally, we are upset about it. Being human, we attempt to use all the resources at our command to get our own way not just for selfish reasons, but because we think it is right.

I venture to say that the greatest harm can sometimes be done by the person who is the most sincere in his conviction of his own rightness and his own correctness and his own honesty.

It is people of that sort who have to be checked by the system of checks and balances which the Constitution provides specifically and explicitly. We will never keep this system unless we fight for it, as the chairman so well knows.

Well, the Executive makes treaties with foreign countries, and that is right because we cannot all go into negotiating with foreign countries. Just our experience, as well as logic, clearly demonstrates the impossibility of that.

The President has got this job to do. But when he has reached a tentative agreement with a foreign country then the Constitution requires that it come to the Senate for ratification or disapproval. Ratification needs a two-thirds vote; and the importance of the Senate's participation is shown by the requirement of the two-thirds vote. A majority vote, a transient one-more-than-half is not enough. A two-thirds vote is required and, as the Senator knows, from experience in various applications, a two-thirds is not lightly come by.

The great purpose of the constitutional requirement of treaty ratification by the Senate was, and is, to prevent the Executive alone from involving us in entanglements with foreign countries.

And yet the practice has grown increasingly, under six Presidents who have held office during the time of my service in Congress, for the executive branch to attempt unilaterally to bind the United

States in agreements with other countries. They call it executive agreements. Well, this just means that the President makes a deal, by himself. There is no warrant for it in the Constitution, no mention of it.

But under such arrangements we have been committed to a great variety of things, the destroyers for bases deal, of lend-lease arrangements, Korean mercenaries, just for a few examples. Over the whole period of the last third of a century, these things have been going on to our own knowledge, and I have no doubt that under earlier Presidents there were similar encroachments on the prerogatives and the responsibilities of Congress. We are always asked to pay for the cost of these things, but we have not been able to exercise our responsibility to consider them ahead of time and to approve or disapprove—to disapprove as well as to approve.

There has been created an atmosphere in which, if Congress exercises its power to disapprove, it is considered recalcitrant, stubborn, mulish, and obstructive.

I have no formula or precise test for the determination of when it is proper and when it is not proper for the Executive to make agreements by itself. I do not think you can make one, but that does not mean we should not try. I think we can approach one; we can perhaps begin to prick out some of the spots on this line of demarcation. But I think, in general, all we can say, really, is that if a matter is important, surely the Senate should have a voice and it should be treated as a treaty. If it is relatively unimportant, or perhaps if it comes in a gray or middle area, we just sort of have to deal with it on the basis of looking at each instance as it comes up. And here is where, of course, my interest in getting all agreements before us comes in. At least, if we have them all before us we can look at them and we can then decide whether, in particular cases, matters are important enough to justify an insistence upon our—

Senator ERVIN. I think the advantage of that is—and of course it is well recognized as constitutional doctrine—that treaties are placed on the same parity as an act of Congress in the Constitution. It is recognized that Congress by a subsequent act cannot abrogate a prior treaty, and surely no one can contend that an executive agreement has any more dignity than a treaty. If Congress can pass a subsequent act and nullify a treaty that it thinks is unwise, it could certainly—if it knows what is in the executive agreement and finds one it thinks transcends what should have been done either from the standpoint of power or the standpoint of policy—it could certainly pass an act to nullify an executive agreement which it felt was not either in harmony with the wisdom or which was at variance with the Constitution. This is one of the great virtues of your act.

Senator CASE. This is exactly true. And to have the sanction of the authority, which the chairman's judgment on matters of this kind carries, is enormously satisfying.

Senator Byrd, Harry Byrd, recently made this point, and I think we are quite right: "When there is doubt about things, the doubt ought to be resolved in favor of the legislative process." And it is our right—not only our right, but our responsibility to insist on this,

because, otherwise, as has happened for so many years and decades, our role will slip away and it becomes a surprising thing for Congress to assert its authority—and, in the minds of many, the wrong thing. But it is not wrong.

This is so interesting in so many ways. As the chairman knows, I have not always agreed with my own party on certain things as the chairman has not always agreed with his. But that does not mean that you are not loyal to your party or that you do not believe in it. It just means that you have a higher conception of what party loyalty is than those who follow blindly what is a majority or what a President feels. And this is all we are talking about, and this is what we are talking about here.

It seems to be even more important, because we are talking about, in this case, international agreements and not just those in the Nation or the country but those in the international sphere.

The kinds of things that we have dealt with by agreements that have not been subjected to congressional approval have run the whole gamut, the Taiwan contingency plan is another example. While it may or may not have committed us to defend Thailand, it is not very clear on this, we in the Senate did not even know that an agreement existed. And that is the point of it. Legally, one could say it had no effect without the advice and consent of the Senate. But I do not think the Thais would understand that or did understand it. Unless we make it clear, unless we make it absolutely clear as to the limits of Presidential authority, then foreign countries are going to misunderstand and there is going to be a lot of grief resulting from that misunderstanding and an awful lot of pressure on us in Congress to fulfill agreements which we did not participate in making, although we should have.

Senator ERVIN. It is quite significant that the list of the treaties and international agreements of the United States in force on January 1, 1972, shows that we did not have a single treaty with Thailand. We have several executive agreements concerning agricultural commodities, several executive agreements about atomic energy, and executive agreements about air transportation, but not a single treaty.

Apparently any executive agreement relating to the use of troops is more or less a secret affair.

Senator CASE. That is right. And that raises another aspect of this whole question which I think underlies the wisdom of the Founding Fathers.

Senator ERVIN. We also have an agreement relating to defense, an executive agreement relating to military assistance. We have an executive agreement about economic and technical cooperation and education, but no treaty whatever on these matters with Thailand has ever been submitted to the Senate.

Senator CASE. That is true, and I think it is a very good example of the exclusion of the Congress, and particularly the Senate, from this whole process which it is supposed to participate in continuously, actively.

Well, there are many different kinds of agreements. The chairman has run over those with Thailand just now, and it is an interesting thing to see, with this small country, what a variety there is.

Broadly, I think agreements can be said to fall into several categories. Among the very important ones are agreements providing for military bases abroad, our military bases abroad, and those which revise or extend the rights to bases. Also there are, of course, agreements providing for the storage of nuclear weapons overseas. And there are many other important things like taxation, and sometimes these ought to be included as treaties. But my primary concern here is with regard to agreements which touch on our national security. And, here, whatever be true as to other kinds of agreements relating to business arrangements, cultural agreements and those relating to travel, and the like agreements relating to national security, involving the use of American military forces, clearly are important enough to be treated as treaties.

I do not want to talk about myself, but I did evince my concern on this, as the chairman knows, by introducing a resolution that indicated the sense of the Senate that the recent agreements with Portugal and Bahrain ought to be submitted as treaties. The Senate approved this proposition which was a day when the Senate was not largely attended, but I think it was 50 to 6, and the Executive politely said, "Well, no; we do not think we will do that." So, I found it necessary to ask the Foreign Relations Committee to approve a resolution—to approve not a resolution but a legislative provision that we would not pay for these things until they are submitted as treaties, because when it comes to a question of confrontation, little as we want it, we are really faced with the proposition that our sole authority comes down to the power of the purse. And we do not like to have it that way. We do not like to exercise this ultimate power. But I think matters have come to the point where we must have recourse to it in order to straighten things out.

When it comes to agreements affecting our national security, I think we really have no alternative but that which lies in our ancient right or power of withholding funds for anything with which we do not agree.

Mr. Chairman, I have taken more of your time than I am entitled to. If you have any questions as to the balance of my statement, I will be glad to attempt to answer them either now or later for the record. But I just want to say again that I regard your activity in this field as a crowning achievement in a legislative career that is historic, and I hope you will accept that.

Senator ERVIN. I admit again, as I admitted at the beginning, that this bill was conceived of because of the concept, embodied in your bill, requiring that Executive agreements be filed with the Congress. I sincerely hope that we can arrive at something that is workable.

It is hard to lay down firm principles at this stage, but I have the conviction that the provision of the Constitution requiring the President to make treaties by and with the advice and consent of the Senate gives the legislative branch a voice in the making of treaties and in the formulation of all matters of any substance in them. The executive agreement, of course, is clearly a very useful tool, it seems to me, to implement a treaty arrangement that has been approved by the Senate, and also where Congress, as it has done on a number of

occasions, passes a law authorizing the President in advance to take certain action in respect to trade and other matters. But I certainly do not believe that the executive agreement should supersede treaties in matters of great consequence. Two of the matters of great concern and consequence are those relating to the use of our Armed Forces and agreements in which we pledge financial assistance to other nations. We often have pledges made by the executive branch of the Government which would entail the expenditure of considerable sums out of the treasury, whereby Congress is left in the condition that it has to either repudiate the President or go along as a matter of course.

Senator CASE. That is true. And it has led on a number of occasions to a situation in which, after we have reluctantly gone along then we are charged with having approved of things with which we had nothing to do in the beginning.

Senator ERVIN. Now, I am frank to state that there are some decisions, such as the *Pink* and the *Belmont* decisions, which indicate the President has a constitutional right to act only in one restricted field of Presidential policy; that is, in the sense that he is allowed to receive ambassadors from other countries. That implies the power to recognize the government of another country. Those cases, which also trouble me a great deal, are in the ultimate analysis based on the theory that the recognition process can be conditional instead of absolute—in other words, that the President, before he recognized either as *de facto* or *de jure* the government of another country, can lay down conditions with which that government must comply in order to be recognized by the United States. That is one of the few exceptions that I think the Constitution warrants for an executive agreement.

Senator CASE. Yes, that is a most interesting spiral of authority, and I think it is one which, as the chairman suggested, does have substantial constitutional basis.

Senator ERVIN. But it would be rare that that power would be employed, because it is rare that the President is called on to determine whether the government of a country is a *de facto* government or a *de jure* government.

That is not the usual day-by-day incident in which the executive agreement is employed.

I think you made a fine exposition that I think is in harmony with George Washington's Farewell Address. I think perhaps the wisest thing he said was that it is just as important to preserve the distribution of power among the several departments of government as it was to originate them. Washington said that the Constitution was designed to make each department of government a guardian to resist encroachment by other departments upon the domain assigned to it. That necessarily causes some friction. Judge Brandeis said that the Constitution was intended to cause a little friction in order to save the people from arbitrary exercise of power by any one department of government.

Senator CASE. This is axiomatic and nothing to be unhappy about. I do think that General Washington, the President and Father of Our Country, was extraordinarily ingenious. He took a somewhat dif-

ferent view as to executive privilege which I do not think we can completely follow. On one occasion at least, he justified withholding matters from the House, and I think it was something about the Jay Treaty, on the theory that he was protecting the Senate's prerogative in the matter of ratification of a treaty. That was an exercise in logic that is to be wondered at, I think.

And yet his instincts were sound, and, even in the instance you referred to, he was talking about the prerogatives of the Executive. That was his job to defend, as it is our prerogative of the Legislature.

Senator ERVIN. Yes.

Mr. EDMISTEN. Senator, I want to point out for the record that we have all sorts of mutual defense assistance agreements with Portugal, including the one to which you alluded. We have a treaty entitled "Treaty for the Advancement of Peace." We have another treaty called an arbitration treaty. I think this points out the great significance that the Department of State places on executive agreements as opposed to treaties in many instances.

Senator CASE. You are quite right, and we have fallen into the practice of taking care of the trivials by treaties, and having separate votes and rollcall votes in the Senate, having them on Mondays and Fridays as a means of getting people to spend a long weekend here instead of away, and then letting matters of real substance, as you have indicated, be done by executive agreement. And this is, I think, something we are all concerned with.

Senator ERVIN. Well, Senator, the subcommittee is deeply grateful to you, not only for your appearance here but for the fight you have been making in this field for a long time. We solicit any suggestions that may occur to you at any time as to changes in phraseology that you think would make this bill more workable.

Thank you very much for your presence here, Senator——

Senator CASE. Thank you.

Senator ERVIN (continuing). And for your substantial contribution.

Will counsel call the next witness?

Mr. EDMISTEN. Mr. Chairman, the next witness is Dean Adrian S. Fisher of the Georgetown University Law Center.

Senator ERVIN. I do want to welcome you to the subcommittee and express our appreciation not only for your willingness to come and give us the benefit of your views on this subject but also for the great help you have been to us in times past.

STATEMENT OF DEAN ADRIAN S. FISHER, GEORGETOWN UNIVERSITY LAW CENTER

Dean FISHER. Well, I am honored by the opportunity, Mr. Chairman. I hope you will feel the same way when I am finished. There used to be an old statement by a man who said:

Let he not boast who puteth on his armor but he who taketh his armor off. And I hope I can live up to your kind remarks.

Senator ERVIN. I just wondered. We have might few opportunities, with our concerns about government, to ever take our armor off.

Dean FISHER. I have my statement here, Mr. Chairman, and I am

honored every time I have an invitation to appear before this committee because of the pleasure that I find in exchanging views on points of law with the chairman, who I consider to be one of the great constitutional lawyers in our country.

I would like to start out—in starting on this subject—with the respectful suggestion that we deal with the problem of executive agreements and in dealing with them that it might be a good idea to divide the subject into two broad general categories.

The first category consists of—you can characterize them any way that you like—consists of executive agreements either entered into pursuant to a treaty, prior treaty, an executive agreement entered into pursuant to authority granted by existing legislation or occasionally an executive agreement that is to be ratified by the Congress itself.

Now, that is one category.

There are times when an agreement draws a little bit of support from each of these three sources so I am being a little bit categorical in saying three categories.

But I would like to point out that the common element in all three of these, Mr. Chairman, is that congressional action, either in the form of a prior approval or subsequent congressional approval or by two-thirds of the Senate, is an essential step in the international commitment coming into being. Even though it is called an executive agreement, the Congress is in there in one form or another, either with the prior treaty, subsequent congressional approval, prior congressional approval.

Now, the second category—and I say “broad category.” It is not that broad. It is really pretty small, because there are not very many of them—is the executive agreement which the Executive entered into on the basis of its own authority granted by the Constitution.

Now, I would like to deal, first, with the first broad category, and I think some illustrations are in order.

Lots of times, the Senate, in approving a treaty, has approved provisions that require implementing agreements. The Japanese Peace Treaty was an illustration of that, and I am sure the chairman will recall that in the case of *Wilson v. Girard*, 354 U.S. 524, the Supreme Court held unanimously that that treaty authorized the status-of-forces agreement, the security agreement with Japan under which Mr. Girard was tried, and given a very fair trial as it turns out.

Now, a good illustration of an executive agreement entered into, with prior congressional authorization of course, is the reciprocal trade program. We have handled a lot of agreements under that, and the Congress has specifically authorized it. It can set guidelines, and it says:

We authorize you to do the following thing.

In some of the earlier mutual and defense legislation, Congress not only specifically authorized agreements, but required them. But it did not require you to come back in with a treaty. It says:

What we want is for you to undertake agreements providing for those kinds of things.

We entered into an agreement once on an emergency basis in which I got Chairman Tito of Yugoslavia to declare his willingness to support basically democratic positions which I regarded as rather a nice trick at the time, but there we had to enter into the agreement. It was not the question of "Could we?" We could not give the assistance we needed to give Yugoslavia from slipping back into the Soviet hands, and we had the agreement, and it actually provided the agreement. And the chairman of the Appropriations Committee and an old friend of my family, Senator Kenneth McKellar, was there to be sure we lived up to it.

Now, the third type of executive agreement is really a special case, and those are the executive agreements under which the executive branch enters into an agreement and says

This agreement only becomes law if both houses of Congress approve of it.

Now, they sometimes get a little bit more controversial because there are people in the Senate who very often feel this course of conduct is adopted because the executive branch feels that it cannot get two-thirds of the Senate, and that therefore they are trying for a simple majority of both houses of Congress. That sort of argument held up the St. Lawrence Seaway for about 15 years. As a practical matter, it was a correct analysis. One reason that the agreement was submitted as an executive agreement to be approved by both houses was because the seaway project as originally devised, had enemies in the private power people on the one hand and the people who did not like the seaway on the other, and between the two of those groups they made up more than a third of the Senate, and the opponents with a third plus one at least could easily block a treaty.

So, there are a lot of learned articles on the question of whether you should go with an executive agreement to be approved by an act of Congress. And I remember unsuccessfully trying to persuade—Mr. Acheson and I—Congressman Whittington from Mississippi that this was the proper thing to do. He was extremely polite to us, and he did everything for us but vote for us, and we did not succeed.

This experience indicates that it is not always a simple operation to get formal approval for an executive agreement in a subsequent act of Congress. On the other hand, when the executive agreement involves an ongoing program and particularly one involving money, it is a good idea to get both houses into the act, not that a treaty could not serve as authorizing legislation as a constitutional matter, but it is so much better when going back to the appropriations committees to have had both houses of Congress in the initial decision.

In the first place, your reception in the House of Representatives is better if they have had a part in the program when it was begun.

The political significance of the agreement is an important factor also.

Now, no one would say we should have entered the United Nations by an executive agreement. And the notion is, really, that this is a fitting thing to do in things that have a high political overtone involving high policy, which normally, traditionally, and under the Constitution would be taken the treaty route rather than executive agreement approved by subsequent acts of Congress.

But where I am afraid I might have a slightly different point of view, Mr. Chairman, from that that you hold is that it does not seem to me, starting with the executive agreement approved by a subsequent act of Congress—and such things do exist—there are lots of them, and I could cite the agreement establishing the FAO as just one example—it does not seem to be terribly sensible to say: All right, you are going to give both Houses of Congress a veto on something you are going to ask Congress to approve in the first place.

I mean, there are enough people in the Senate who are concerned enough about the Senate's prerogative, to pass on a highly politically significant treaty, so that you may lose your simple majority in the Senate. There are some people who might be with you on the merits but are against you on the way of proceeding, and that is exactly what happened in the case of the St. Lawrence Seaway for all those many, many years.

But it does not make a great deal of sense to have an act of Congress that says that an executive agreement which is to be ratified by Congress would not be made effective if both houses of Congress vote it down. I mean, because you are going to ask both houses of Congress to vote it up.

Now, with the greatest respect, I feel a little bit the same way on an executive agreement approved by a prior treaty or by a prior act of Congress.

If the Congress has acted in the constitutional way, without any reservation at the time it did it, to authorize an executive agreement, it does not seem to me that a concurrent resolution can take back that authority.

Now, if they put a reservation in at the time, that is something else again.

But if the Congress acted in a constitutional way to authorize an executive agreement, then it would have to do so pursuant to one of the expressly delegated powers.

You cannot have the treaty power as a delegated power in that context. It is only a source of power if you go the actual treaty route.

But if the Congress has actually authorized it by a vote, and it becomes law, my own personal view—and it is with fear and trepidation in view of your wisdom that I express a contrary view—if they have authorized it, then, they oughtn't to be able to take it back by a concurrent resolution.

Now agreements of this kind are going to be the subject of some controversy. You are going to have an argument as to whether Congress has, in fact, authorized them. There are arguments with regard to a couple of executive agreements going on now, and it might have been that the wisdom would have been to put those in treaties.

For example, we had an executive agreement temporarily dealing with the status of U.S. forces in NATO countries, but we had to have something temporary. But we then put in treaties, and we then went the whole treaty route because we had a feeling that unless you did that you would not really have any satisfaction on behalf of the Senate that we are doing the right thing.

So, for this reason, while I have some differences with the problems of S. 3475. Mr. Chairman, I think S. 596—that is, the one that

requires the treaty, the agreements, to be submitted to Congress—I think this makes very good sense.

Senator ERVIN. I would like to say I appreciate very much your statement along this line, because I would like to state, and emphasize, that this bill did not, unlike Minerva, spring full grown from Uranus to Jupiter.

Dean FISHER. My own feeling is the practical problems of administered S. 596—and I know the assistant legal advisor in charge of treaties will probably advise you about this—Mr. Charlie Bevans. He is a fine public servant, and I worked with him more years ago than I care to admit.

I think I put him in the position he holds now, and I brag about it everytime I get the chance, because I think he is a great public servant.

But I do not see anything wrong with the notion that the executive branch would have to tell the Congress what it has committed this government to, even though it claims it had authority to do it under a prior act of Congress.

You know, we have had some arguments about executive privilege in one form or another, and probably you are going to get some more arguments about this subject as to recommendations made in the actual negotiating process, but clearly there should be no claim when the discussion about what the commitment of the United States actually is.

You know, if it is a commitment that binds the United States, the Congress should know about it. Sure you are going to have arrangements where there are security problems, and I take it that S. 596 takes care of the security problems by its provisions for a mandate of security.

And there are some quite highly classified agreements. I cannot go into detail about what they are, except to say that they know, a committee of Congress knows, all about them, the Joint Atomic Energy program, to give you some idea, and it has worked pretty well.

And I just do not see any real objection to it, that the Congress should be advised as to who thinks he has committed the United States to what, even though they claim to have authority to do it already, because, you know, it just seems to me to be the failure, to advise. And that happened once in the Far Eastern Agreement in Yalta, and whether they were executive agreements in the strict sense of the word, I do not know. It comes out sooner or later, and if it has been kept secret, from the Congress, the question is always asked, How come?

Now, you may have to keep the secret from the entire world, depending on the nature of the argument, but it certainly shall not be secret from the Congress.

Well, now, I respectfully submit, sir, that this takes us down to the last and the toughest, nitty-gritty part of the executive agreement problems, ones that are truly executive agreements in which the executive branch is saying, Mr. Chairman: We have the authority to do this, and we get it out of the Constitution. And there are some. You know, the President has the authority to recognize for-

eign governments. I guess that is implicit, in receiving ambassadors that he has the authority. And as Commander-in-Chief of the Armed Forces, there is some constitutional authority, some element of constitutional authority, in the President.

I can only think—in my prepared statement, I dealt only with one area, and that is the power to recognize foreign governments because primarily I think I know a little bit more about that than the powers as Commander-in-Chief and primarily because the going is not as rough in that area as the Commander-in-Chief.

But at the risk of taking a chance on it, the President as Commander-in-Chief probably has authority to authorize an armistice agreement.

The Korean armistice was negotiated under the authority of the President's power as Commander-in-Chief, and it started with President Truman and finished with President Eisenhower.

Could we have the authority to negotiate a peace treaty?

I would say no. But for an armistice, you do not have to keep shooting, and, as Commander-in-Chief, he can make a deal to see that the shooting is stopped.

The one that caused the most excitement and litigation in this area was, you remember, of course, the agreement for recognition of the U.S.S.R. in 1933, under which we recognized the Soviet Union, and there was sort of a general settlement-of-claim arrangement in which we recognized the Soviets' assignment to the United States of their claims to property in the United States. And many people say, impliedly recognize, as the Court later decided, the Soviet action nationalizing the assets of its nationals abroad who own property in the United States.

Now, this was in the courts at least three times, from the *Belmont* case, the *Guaranty Trust* case, and finally the *United States v. Pink*.

And it is interesting to note that 14 Supreme Court Justices sat on those cases, and they included people of such diverse views as Justice McReynolds and Justice Black, and none of them said that the President had no business in entering into the Hull-Litvinov assignment.

Now, there was a difference of opinion as to what the assignment meant and also a difference of opinion as to the impact on local law.

But, you know, no one really got terribly excited about those cases. I was not around at the time of the *Pink* case; I was in the service. But I got back, and no one ran up and down and said "What a horrible thing it is, *United States v. Pink*." It was not until the debate on the Bricker amendment that somebody held up the *Pink* case and said that back in 1942 something happened that required an amendment to the Constitution. Nobody worried about it in the interim, between 1942 and 1952, but all of a sudden in 1952 it became a grave danger.

So, at the risk of sounding simplistic, Mr. Chairman, there is some form of constitutional authority in the President to enter into executive agreement. It is not very big and there are not very many agreements entered into on it. During the period that I was Legal Advisor, I think I only recall one that was put into effect, shortly before I became Legal Advisor of the Department of State, and one that came into effect shortly after I became Legal Advisor, and that

was an end of the Berlin Blockade and the end of the Korean Armistice Negotiations. I was not there for either one. I was sort of in between the two.

The way I see it, and it may be simplistic, if the President has the constitutional authority in a limited area, I do not think concurrent resolution can take it away from him.

On the other hand, if the President has not got it, he has not got it, and it seems to me that even the failure of a concurrent resolution to pass, you know, one House saying he has got it and one House saying he does not, that does not give it to him if he does not have it.

And, there, again, I sort of have a feeling in the Case bill it means that Congress has to be told about it, and if they do not like it they can raise a lot of sand, and it seems to be probably a better way than to try to have a series of concurrent resolutions saying: "He has it here and there." You know, the courts can decide those cases, and the old view restricting standing and limiting the authority of courts on political questions—a view I agreed with 30 years ago—and it is not very strong now, they decide pretty much on everything. So, I do not see much difficulty in leaving this matter to the courts. If the courts can decide, for example, in *Wilson v. Girard*, whether or not that executive agreement was authorized, they can make a similar decision in a similar type executive agreement.

Senator ERVIN. The *Belmont* case originally troubled me a good deal, but the more I read it, I come to the conclusion that Justice Sutherland, who wrote the majority opinion, emulated the example of some Senators in that he talked too much.

In other words, as I see that case and the Sutherland analysis, it might very well have been decided more or less on a basis, a standing, because the banker there had no pecuniary interest whatever in the funds he was holding.

Dean FISHER. Whoever owned the money, the bank did not. That was clear.

Senator ERVIN. And there was nobody else a party to it, and, as Justice Stone said in his concurring opinion, Justice Sutherland's opinion undertook to deal with the cutting off of the rights of people who were not parties to the suit and who would not have been bound by any judgment they rendered. It seems to me that the real rationale of that case is better understood, or better expressed, really, in the subsequent case of *Pink*, wherein Justice Douglas said, in effect, that the President undoubtedly had the power alone to recognize the government of another nation as a de facto or de jure government, and that when he did so, as far as our courts were concerned, that he thereby validated all of the acts of that government within the scope of its power from the beginning and, therefore, validated the confiscation or nationalization, or whatever it is called, of these assets.

Justice Douglas also said, and it seems to me quite a reasonable conclusion, that the power of the President in granting recognition includes the power to grant terms through which recognition is to be granted.

For a long time, we were not able to restore diplomatic relations with Russia on account of the controversy about the claims of

American citizens and of our nationals. So, to my mind, he makes the very rational conclusion that the President had the power to recognize a foreign country's government as being a valid government, and to lay down conditions precedent or conditions accompanying that recognition. One of those he laid down would be assignment to the United States of claims of Russia to these assets in New York State and for the benefit of American nationals and giving them a priority over foreign nationals.

That case became fairly simple to me on that analysis, but it used to trouble me a great deal.

Dean FISHER. Well, Mr. Chairman, I have really felt that there was a little bit of overkill in the opinion there, too.

Senator ERVIN. Yes; I thought so. Justice Stone made some very pretty wise observations on the overkill in the second case.

Dean FISHER. Yes; that is right. In the *Pink* case they wrote more than they needed to, to decide the case as a practical matter under the normal conflict of law rules of a foreign government in effecting property or territory of the United States, giving the effect or not giving the effect as a matter of public policy. And here we had a question: Was it New York public policy or national public policy? And since the prime actors—the controversy in this case was not between the U.S. claimants of this property, it was foreign claimants, and, really, New York, basically, had a foreign economic policy they were putting into effect because they are a banking State. They did not really have the normal sort of State policy that would come under the normal State's rights. They were interested in the interest of the foreign creditors, and so I felt that the decision could really have been decided on quite narrow grounds. But I think it was right, and my only problem in getting into it here is that it does show that there is some area, it may not be very big, but there is some constitutional authority on behalf of the Executive to enter into agreements on their own. And I do not think that, if he has got it, that a veto by the two Houses of Congress can take it away from him any more than the other way. And that may be an excessively simplistic view, Mr. Chairman, but it is the way, after the wrestling with this, I come up.

I know you have the question: "Well, suppose they abuse it?" Then there are some people already who think they have abused it recently. Well, I do not know whether they have abused it recently or not. I do not think it is very wise to deal with that sort of thing on an executive agreement rather than a treaty basis. But I think the pressures by the Senate, the investigatory pressures, are strong enough to keep the executive agreement the simplest kind; that is, straight constitutional executive agreements within fairly narrow bounds. But I do not think it can cut it down below where it already exists.

Incidentally, in the *Pink* case, that was not purely an executive thing. Congress was in the act. It passed a procedure for the way people would operate under the claims, so that it was not run around the Congress. The total program that was being carried out there was being carried out by an act of Congress as an essential part of it.

Senator ERVIN. Do you agree with me that if the power with which the President may have to make executive agreements in connection with the recognition of a foreign government is the power that would be exercised only on rare occasions because we do not have the necessity of recognizing another government every day?

In other words, the President's power to make executive agreements without the consent of Congress in connection with his recognition of another government is a power which, in the very nature of things, can be exercised only rarely because we do not have a day-to-day problem of recognizing new governments?

Dean FISHER. Well, not a day-to-day problem, Mr. Chairman.

There has been an awful lot of new states popping recently as the result of political changes in the African Continent, and I guess the executive branch has to make a decision—probably has a right to make a decision—as to which one of the treaties that we had with the former colonial power that covered the territorial area of those new states is applicable to the new states and particularly if they give U.S. nationals rights under them, and they may well want to say that prior to your becoming a new state we had the following interest in this area, and our recognition is contingent upon our having the same thing. And I would not want, having been in the United Nations, once in 1951 and then back in 1969, and having seen a very large number of new faces there, there were quite a few new states that have come into being—I think we have just about run out of them, though, and I do not see very many more.

And, so far as the future is concerned, I think, Mr. Chairman—

Senator ERVIN. There was a time a few years ago when many new states in Africa were gaining their independence each year. So, there is a frequency there greater perhaps than I had thought at first blush.

Dean FISHER. Maybe in the future, Mr. Chairman—I can see three or four more in the future that this process can happen to, but we are almost—we have recognized almost everybody now as far as the new states or the emerging nations are concerned. There are a couple still to go but not very many.

Senator ERVIN. I would like to ask your opinion on the constitutional power, in one respect, as to executive agreements made without the consent of Congress. Of course, it is a well recognized constitutional principle, as I understand it, that treaties stand on the same basis as an act of Congress, and that Congress, by passing a subsequent act, can abrogate a prior treaty. Is that not true?

Dean FISHER. Well, as far as the law of the land of the United States is concerned, the law to be applied by U.S. courts, the subsequent act of Congress, if it is made clear that it was intended to be, that is it.

Senator ERVIN. Certainly, if that be true, and an executive agreement is made by the President without the consent of Congress, certainly it cannot have a higher dignity than a treaty made by a joint action of the President and the Senate.

Dean FISHER. I would agree with that.

Senator ERVIN. And, therefore, Congress would have the constitutional power to nullify or abrogate an executive agreement of that nature?

Dean FISHER. Well, Mr. Chairman, when you say "nullify or abrogate," at the risk of sounding "nitpicky" and legalistic, I would like to make a distinction. Congress, as far as a treaty, cannot nullify a treaty as an international obligation of the United States—and as far as that is concerned, we are still bound by it. And if we were having to go into a world court, or anything like that, we could not say that we have got a defense. Our Congress passed a law and said that the treaty is abrogated. That could not be our defense. On the other hand, it has been settled for a long period of time, as far as the law of the land is applied to U.S. courts, and, as far as that is concerned, the domestic law of the land, an act of Congress is controlling. So that an act of Congress, as far as the laws to be applied by the U.S. courts are concerned, a subsequent act of Congress is controlling. And in the case of treaty and of foreign jure and in the case of executive agreement which has only the executive power behind it, clearly an executive agreement can be set aside as a domestic law of the land by a subsequent act of Congress.

Now, you have a problem of vested rights and things like that, but subject to that—and that is a fifth amendment problem that would be applicable in any case—it is clear that Congress has certainly the same authority, probably a little bit greater, in the case of an executive agreement because there is always a fringe area where there is doubt as to whether this executive agreement was authorized by the Constitution or not, notwithstanding a debate on the Bricker amendment. There really is not much fringe area on most treaties, and particularly since you have got two-thirds of the Senate to agree, and you have a pretty wide consensus as to whether or not it was a proper action.

Senator ERVIN. Now, you indicate that in addition to this power that grows from the recognition power, there are also executive agreements the President is authorized to make as Commander-in-Chief of the Armed Forces. That, of course, is a very troublesome field, I would think.

Dean FISHER. The precise delineation of this is a very troublesome field.

Mr. Chairman, for a period of time we authorized executive agreements that dealt with the status of U.S. forces in Europe. They had gone there under a clearly recognized Executive power, the President's power as Commander-in-Chief, based on the declaration of war. There was not much doubt about that. But they were still there; and, then, what to do? Our allies did not really feel that they wanted to keep them there on the same basis, on what was technically a wartime footing, as they did, but not really a wartime footing as when combat was going on, so we worked out some interim executive agreements and we were criticized for that.

On the other hand, if you go on the assumption that the territorial sovereign in the last analysis, once the shooting has stopped, has got the right to say on what terms the troops remain in his territory, at least the allies do—not a defeated power, but the allies

do—is it not a good idea to work out some sort of an agreement with them so we all know where we stand?

Well, what was done then and was agreed was to work out an executive agreement in this instance but then negotiate treaties and put the treaties to the Senate. The Status of Forces Agreement went through the Senate. They got a few understandings hung on them in the process, but that is part of the process. Now, once the Status of Forces Agreement had gone through the Senate, I think we did feel that, for example it was not too bad to have an executive agreement based on a treaty to handle the Japanese forces, forces in Japan, because you had had the pattern. We knew what the views of the Senate were, and the Senate was not under any misapprehension when they approved the Japanese Peace Treaty as to what the security arrangements would be like, because you had had fairly extensive discussions of the subject. And I agree with you.

And in my prepared statement, in view of the fact that there is not the world's greatest consensus today as to what the President's powers are as Commander-in-Chief with respect to ordering armed forces, I did not want to use that as an illustration of something that was fairly clear because there may be something there.

The only illustration I was able to think of that was fairly clear and that everyone would agree on was an armistice agreement.

Senator ERVIN. I might state, too, that I have been chairman of the subcommittee of the Senate Armed Services Committee that has to study the practical operation of the status-of-forces agreements. I have to say that they worked out exceedingly fine and have tended to minimize the inevitable friction of having foreign troops stationed in another nation.

Justice Sutherland also talked entirely too much in the *Curtiss-Wright* case, which is very often cited in the field of foreign affairs. It seems the Justice contradicted himself at least twice in the opinion because he talked as if the powers to regulate foreign affairs were something that just sort of floated around and had no connection with the Constitution. Then he stated emphatically twice, once by quotation from the Foreign Relations Committee right after 1800, that everybody had to do everything in subordination of the Constitution. With all due respect to the Justice, I think this is the case where he did a fine job of complicating simplicity.

Dean FISHER. Well, I would agree with that, Mr. Chairman. If I had described the *Curtiss-Wright* case, I would say that this merely holds that the standard of delegation, that what was undue delegation, considered undue delegation by the court in the domestic field at that time, they have a somewhat broader range in the foreign field because of the nature of foreign policy and its process, and put that way, I do not think many people would disagree.

Senator ERVIN. I think the case could be reconciled with the principle that Congress could pass the law and then make its operation dependent upon the final action by some proper officials—as in this case, the President, which would have simplified it a great deal. But I was struck by Justice Sutherland's insinuation that the powers of the President or of the Congress in the field of foreign relations did not originate in the Constitution. I remember that my own State of

North Carolina declared its independence and adopted its own constitution in 1776, and the Articles of Confederation did not come into existence until 1781. I believe North Carolina could have had foreign relations if it wanted to, and made treaties during that intervening period of time. Justice Sutherland said it was not the power that came from the States, but he did finally say that the power had to meet constitutional standards.

DEAN FISHER. He took a long while to get there.

SENATOR ERVIN. I also like to think most of his expressions are like Justice Frankfurter's dissenting opinion, I believe, in *Lambert v. California*, where the Court held that ignorance of the law excused a crime. Justice Frankfurter said that this opinion would ultimately be lost among the flocks, and I think most of Justice Sutherland's remarks in *Curtiss-Wright* deserved a similar fate.

DEAN FISHER. I would not disagree with that, and I have the greatest respect for Justice Sutherland, whom I knew only slightly. But I think during that period the Court tended to get very few cases involving international law, and when they did, they seemed to have a lot on their mind, and they wanted to get it off, and it would have been better if they had just decided the cases on the narrower basis, and it would have saved a lot of oratory, particularly during the 1954 period when it was very interesting the way the names and numbers of the players changed. I hate to use the words liberal and conservative, they are slippery words, but people normally under the conservative side were reading Justice Sutherland's opinions with horror, and when I grew up, the people on the conservative side of the spectrum used to read his opinions with approval, not horror. And it is interesting to see the switch. I find it interesting the switch in things now in the peace movement people when they will cite the fine opinions of the U.S. Supreme Court in the case of *Panama Oil Refining v. Ryan*, and what a great opinion by the Supreme Court in the *Shechter* decision. And when I was in law school and growing up, the people who were growing up then used to fuss at the *Panama Oil Refining v. Ryan*, and they were trying to enforce an order that had been repealed, and nobody knew it, and in the *Shechter* case, and people were getting ready to pack the Supreme Court because of those decisions. And now people are saying what great things they were, and it makes me more conscious of the passage of time than I would like to be.

SENATOR ERVIN. Yes. Well, you know, at the time, people who were liberal in their attitudes thought that the decision in the *Sick Chicken* case was as sick as the sick chicken. Now their intellectual successors approve it, saying what a great thing it was.

DEAN FISHER. But it just shows how the world does change. But, again, on these international recognition cases, I agree with you, there is judicial overkill, which is perhaps the wrong term to use, but there is a little bit in both the *Curtiss-Wright* case and in the *Belmont* case, and even, with no disrespect to Justice Douglas intended, but his too tight analysis on treaty and executive agreement in the opinion in the *Pink* case, he did not need that to decide that case, in my judgment. And I have the greatest respect, and he is on

the Court and I am not, but that is one of the great advantages of being a professor.

Senator ERVIN. Professor Miller.

Professor MILLER. Thank you, sir. I hesitate to ask Dean Fisher, with his experience, any questions at all, because he may shoot me down. But, I will pose a couple, if I may.

Dean FISHER. Certainly.

Professor MILLER. First, Dean Fisher, I wonder if you could summarize for us your position, as far as this bill is concerned, as to the power of Congress to pass a bill similar to, if not exactly in the same terms as, S. 3475?

Dean FISHER. Well, I think Congress could have the constitutional authority, the Congress could have the constitutional authority to say that from now on in no existing authority to enter into executive agreements is it repealed across the board except on these terms. I have doubt—you know, that would enable you to repeal, you know, reciprocal trade agreements, elements of the civil aeronautics and the Civil Aeronautics Act, and it would be a very, very wide, across-the-board repeal of a series of existing authorities. I have doubt. I am not sure whether Congress could make the same decision with respect to a previous executive agreement entered into pursuant to a treaty if the treaty were still in effect. Probably it could. Congress could probably say that it is not going to take up any future executive agreements to be put in the Congress for approval like the St. Lawrence Seaway was, but if the thing is going to be put to them for approval, it is sort of silly to say they are not going to deal with it. So, it is a little counter-productive to say that Congress will make a rule that they will not entertain an agreement that is put to the Congress for approval, because there are many agreements that are. I think that notwithstanding my own perhaps involvement in the St. Lawrence Seaway, the FAO was an obvious great football put into an operation, and it was a great agreement put to the Congress, and Congress approved it. Now, I do not believe Congress could say that the President cannot enter into any form of executive agreement pursuant to its constitutional power, or say that he could not have entered the *Pink* case type of agreement. The Congress could have annulled it as domestic law once he entered into it. I do not have any doubt about that. It turned out they did not at that time, but they could. Congress said, Look, that is not the way we are going to distribute these assets," and they could set an entirely different set of ground rules if they wanted to. But I do not believe they could have said that "you cannot enter into it in the first place."

Professor MILLER. But, the bill requires the Executive not only to tell Congress, but to lay executive agreements before Congress for 60 days.

Dean FISHER. And then subject to disapproval.

Professor MILLER. That is right.

Dean FISHER. Well, the subject to disapproval is where I would get off the trolley.

Professor MILLER. Excuse me. On all agreements?

Dean FISHER. Well, you know, Congress does not have the right to make the supreme law of the land by a simple majority. The President either has to sign it, or there has to be a veto.

Professor MILLER. Dean Fisher, may I interrupt? Do you have a case that indicates that a concurrent resolution cannot do this? I know there is a statement by President Roosevelt, printed in the Harvard Law Review by Justice Jackson, in which he thought you could not get out of the lend-lease by concurrent resolution. But, I do not know of any cases. Do you know of any such cases?

Dean FISHER. For example, let us assume there are existing authorities under the Reciprocal Trade Act to enter into an agreement. Now, you passed this statute. This statute—I assume you would have to have your codifiers go through every existing authority to enter an executive agreement that exists in the U.S. Code to indicate whether that is changed by this statute or not. The Congress can repeal every existing authority it has, there is no question about that. I doubt, however, if the Congress can change, by concurrent resolution, the effect of an executive agreement entered into pursuant to the President's constitutional power as having an impact on the supreme law of the land. The Congress could change the by-laws, but that law would require either Presidential signature or an overriding veto.

I understand the question was my views as to the constitutionality of the bill. I do not have any question that the Congress can revoke any authorization that it has given to enter into an executive agreement, or that it can revoke it by this procedure, by saying, from now on this authorization is given only on these terms.

I am not aware of any court test of it, but Senator Symington related to the Atomic Energy Act, which has provisions for the sort of sliding scale type of agreements under which there are some cases of congressional authorization and other types of case authorization unless revoked, and so far as the executive agreement is based on the act of Congress. I am not discussing the wisdom. I think I have the greatest personal respect, and I think it would be unwise, but the question relates to the congressional or constitutional power within Congress to revoke any executive agreement it has given, and this would involve a lot of acts of the Congress, the Civil Aeronautics Act, Reciprocal Trade Act, and so on. You can do it, there is no question about that.

Now, I have become a little bit more troubled when the Congress, as Congress is revoking the authority granted by a treaty which is received by the advice and consent of two-thirds of the Senate, it gets a little tougher. But, you can say that since this relates to the internal workings of the U.S. Government, it is part of the domestic law rather than international law, and therefore, Congress can change it, although it is a little harder. It surely has much more serious international implications because when we entered into these treaties which provide for the implementing agreements, the general understanding was the implementing agreement would be not things of such formality as this bill envisaged.

The Congress could certainly refuse to consider a bill, an executive agreement, like the St. Lawrence Seaway, or an agreement es-

tablishing the FAO if it did not want to consider it. It would be, as a practical matter, much easier for the executive branch in that matter to submit it and say it is law unless you by both Houses of Congress revoke it, rather than fighting the uphill battle which we attempted to fight, and I do not mean to come back to the seaway so often, but it is a good illustration of trying to get both Houses of Congress to approve it. There is no constitutional problem there, although you could not very well bind a future Congress if it said, "Look, we want you to approve it by both Houses of Congress," and I doubt very much Congress would say, "No, we cannot; all we can do is disapprove it." And somehow that seems a rather anomalous situation.

I do have a constitutional problem, however, as opposed to a policy program, where it relates to the authority of the President as under the Constitution, and the two in my judgment are rather limited areas. One is the recognition and things attendant to recognition; and secondly, the much more murky area of his powers of Commander in Chief, and there is an awful lot of disagreement on it. I think that there is general agreement that it does extend to an agreement entering into an armistice, stopping the fighting. I do not think anybody thinks the President, such as President Eisenhower in his action in 1953 or 1954, whenever it was, was using an unconstitutional power. But, I have serious constitutional doubts about that, Mr. Chairman.

Now, I have serious constitutional doubts, also about this bill, saying that the Hull-Litvinov agreement or assignment could be negated by an assemblage of both Houses of Congress. I have no question that the Congress, if it wished, could have negated the Hull-Litvinov assignment by a bill either signed by the President or passed over his veto, and I have no question in my mind but the Congress can give an authorization in a bill to negotiate something that can be revoked by concurrent resolution. But, I would think that a concurrent resolution setting aside, for example, a future Hull-Litvinov assignment, and we are not going to have very many of those, although you know it is at least possible, and I am not privy to any information, that the rash of litigation that followed the so somewhat belated recognition of the U.S.S.R. after 16 years might at some stage come again if there is another belated recognition in the future. And people will be reading *Belmont and Pink*—

Professor MILLER. You are talking about China?

Dean FISHER. Yes I am, and I am not privy to anything, so I am not making any predictions. But, it just seems to me possible.

Where we have constitutional problems as opposed to policy problems in saying that the President has powers as Commander in Chief in the armistice area, or recognition area, can be set aside by disapproval of two Houses of Congress, again perhaps repeating myself, I have no doubt it can be set aside as the supreme law of the land by an act of Congress, not concurrent resolution, and an act of Congress requiring the signature of the President, and the hypothetical situation is rather unlikely.

Professor MILLER. Well, other than these two areas in which at least recognition would be generally accepted, and an armistice—since it could be argued that since Congress has power to declare

war, that it is an implied power to participate in these decisions—do you see any other areas of Presidential power that include pure Presidential agreements?

Dean FISHER. Well, the Presidential power includes the Presidential power to make political understandings which do not have the effect of a legal commitment, although they may have great practical, international, practical and political circumstances. President Nixon issued a communique at Shanghai which, in effect, said that the United States accepted, with some reluctance, accepted the views of both China's, as if there was only one China. Now, we may say that was merely a communique. The Far Eastern agreement in Yalta was only a communique. But, it had great meaning as far as that area of the world was concerned. Some people may argue that it was not necessarily good, and I am not sure there is any way that constitutionally you could tell the President that he could not have entered, he could not have made that communique, since it did imply a position with respect to the U.S. attitude toward Taiwan, an independent Taiwan. We in a sense gave up a legal position at that time, unless the fact that he proposed to do something in something one would call an agreement, an international agreement, it is certainly dead, and it had been before both Houses of Congress and not revoked for 60 days.

Professor MILLER. Would you explain just a little bit, Dean Fisher, the legal significance of that? I am not sure what the legal impact of that would be. I can see the political impact, but not legally. Would you explain it just a little bit?

Dean FISHER. Well, legally in the Japanese Peace Treaty and other actions taken at that time, the United States had gone to considerable length to maintain an option, one settlement of the Taiwan problem would be an independent Taiwan. We maintained that option over many years. Now, it may have been a mistake to maintain it, but it was maintained. As you will recall, the Japanese Peace Treaty, Japan did not cede Taiwan back to China. One of the reasons was that the people that negotiated the Japanese Peace Treaty were not in agreement at that time as to who was China. Japan just ceded its claim to Taiwan, period.

Now, so one of the U.S. options that was opened, it has been open until recently, was the possibility of an independent Taiwan. We have now agreed—

Professor MILLER. Excuse me for interrupting. Are you suggesting that we have sovereignty over Taiwan?

Dean FISHER. No, but that is one of the options that the international community might negotiate.

Professor MILLER. Taiwan was the subject of a treaty with Japan, was it not?

Dean FISHER. That is correct.

Professor MILLER. I do not quite understand how you could suggest that the Government has a legal authority to dispense with Taiwan and to make that legally binding.

Dean FISHER. No; but we have not committed ourselves until this point that Taiwan was part of China. We went to great lengths to avoid just that. But, you could say, do we have a jurisdiction over

Taiwan, and the answer would be not except for partial occupation, but we could also say the Chinese do not have jurisdiction over Taiwan.

Professor MILLER. Neither Mainland China nor the United States has jurisdiction over Taiwan in fact, is that not true?

Dean FISHER. In fact, the Chinese Nationalists are running the show in Taiwan, and we recognize them as the legal government, I assume, of all of China still.

Professor MILLER. Is it not fair to say that the President can do nothing that is legally binding with respect to Taiwan?

Dean FISHER. I am not sure of that. We could have an international conference that deals with the subject of Taiwan.

Professor MILLER. By himself, by a unilateral declaration?

Dean FISHER. That is correct, but whatever authority we had, we have now given up.

Professor MILLER. But what authority did we have, Dean Fisher?

Dean FISHER. Well, we had an authority as a participant in the Japanese Treaty, and as a member of the U.N. to participate in a further conference if we wished concerning the disposition of Taiwan in an international conference. We have given that up. I am not making this political issue. The President may have been quite wise in his decision to do that. On the other hand, or under this bill, would you consider that a new national agreement, would you consider it a communique, that communique issued at Shanghai as an international agreement? It affects legal interests very substantially.

Professor MILLER. Well, how? Explain that. I am sorry that I cannot understand.

Dean FISHER. It affects legal interests as the international community. One option we went to considerable lengths to hold on to was the option for the international community in a peace treaty, which is now gone.

Professor MILLER. But, who is affected? Are not individuals or the nations affected?

Dean FISHER. I would say the international community. I would have very simply in the Japanese Peace Treaty said Japan renders and gives up Formosa back to China.

Professor MILLER. Dean Fisher, the international community is not a legal entity.

Dean FISHER. Oh, the international community has, as a result of pressures—we discussed the emergence of African nations that resulted in the U.N. going from 60 in 1951; to over 100. It is the international community that is responsible for that, referring to it as a legal entity seems to me too legalistic.

Professor MILLER. You are making it legalistic.

Dean FISHER. How did the various countries that are now independent countries in Africa get that status as opposed to the colonial status? Who do you think put the pressure on to make that happen? The international community did, by making it just so difficult for others that many of the colonial powers said, "OK, take it, you are now independent and go." The international community could have had the ability to do the same thing, or maybe it was not that important with respect to Taiwan. We have decided not to, and

that is a decision made in a Presidential communique, which he has every right to make, and I would certainly think it unwise—that is not unrelated to his recognition opolicy to put anything in a bill that casts any doubt upon——

Mr. ABRAMSON. If I could just interrupt for a second?

Professor MILLER. Yes.

Mr. ABRAMSON. I had some problems with the definition, as a matter of fact, of the executive agreement on page 3 because it left out any unilateral. It says bilateral or multilateral international agreement or commitment other than a treaty, and yet if we look at S. 596, Senator Case's bill, it says any international agreement. It would seem to me by the mere fact that they are trying to be specific, it leaves out these unilateral agreements to an international community, and in some way, it leaves out some of the most dangerous parts of agreements, you know, the type of agreement which our Chief Executive, or any chief Executive would go out and say that if upon the fulfillment of a particular condition, this will happen. That is a unilateral agreement which I do not think is covered in this bill.

Dean FISHER. Of course, the communique at Shanghai was not wholly unilateral. It was one of these parallel declarations, your side, our side declarations which everybody knows under the circumstances is negotiated. You know when you do have a parallel declaration, you can call it bilateral, but this has committed the United States not to take a position in international negotiations that it previously had in the U.N. in deliberations and that it was previously free to take, and we are committed now not to do it. I do not know whether you would consider that the President's communique at Shanghai would come under the terms of this bill. It is not at all clear.

Now, as far as the disclosure section of the bill, I do not want to appear to be dragging my feet into the 20th century. I am all for it, and I think that it is great. I think that it is long overdue. And I think that the light of public opinion is very, very, very helpful. Although the whole experience with the Joint Committee, when I was in the executive branch, I sometimes found the pain, in the long run, was always helpful, my problem really is in the subsequent sections of the bill which involves the pro tanto repeal of a lot of fairly well thought out legislation, trade legislation, civil aeronautics, and you say the authorization you were given is now struck down across the board.

Professor MILLER. Dean Fisher, let me interrupt again. That is not exactly true. The authorization merely requires the submission of these agreements to the Congress. Now, there is a precedent for doing that in administrative law, is there not?

Dean FISHER. There is precedent for that in international law in the atomic energy field. But, the difficulty is that it is a good thing, but we previously have authority under the civil aeronautics to negotiation bilateral agreements and we no longer have that authority, we no longer have it, so the striking down, or striking down is too strong a word. I would say drastically modify——

Senator ERVIN. I feel like I should interject myself here and say that I find myself incapable of giving mental habitation to any kind

of a concept that can be called a unilateral agreement. You did not misuse the term minority counsel used. I do not think there is an agreement as long as the thing is unilateral.

MR. ABRAMSON. I think there might be a case. I am aware, if you are talking about contract law, there can be an offer, and if there is not an agreement, until it is accepted, there is no agreement, but there can be instances in which someone can say, I offer this assistance, and then upon your acceptance, or even upon the fulfillment of the condition, you will do this or we will do this.

Senator ERVIN. But no agreement comes until it is accepted.

Dean FISHER. That is correct. I think what normally happens, Mr. Chairman—

Senator ERVIN. This may be a linguistic matter, but I am incapable of comprehending how there can be unilateral agreement, because I think it takes at least two to make an agreement.

Dean FISHER. Yes, sir, I think it does. The situation I was talking about is where things that purport to be unilateral but, in fact, are *quid pro quo*, the meeting of heads of state, and they issue a parallel communique. Each one knew what the other man was going to say before he said his own, and probably there was some jostling around a little bit. Now, that is a problem. There is an element of agreement, at least what the antitrust people would call conscious parallelism, where each knew what he was doing because the other fellow knew what he was doing. Whether you call it unilateral or not, and when I go back to Professor Williston, and contracts, indicating my advanced age, it usually means one fellow has done all that he is supposed to do by making the deal. He has given you the horse, and your obligation is now, pay for it.

MR. ABRAMSON. Mr. Chairman, but if I could have just one rebuttal here?

Senator ERVIN. Yes, sir.

MR. ABRAMSON. The definition says bilateral or multilateral international agreement or commitment. Now, there could be a unilateral commitment. Now, I would agree with you that you cannot have a unilateral agreement, but you can have a unilateral commitment which could be the type of commitment that should be covered under this bill?

Senator ERVIN. Section 2 on page 3 says, "For purposes of this act, the term executive agreement means any bilateral or multilateral or international agreement or commitment." Your position is that bilateral and multilateral modify commitments?

MR. ABRAMSON. No, I am saying it modifies both.

Senator ERVIN. Yes, I said modifies that, as well as agreement.

MR. ABRAMSON. Yes.

Professor MILLER. Let me pose another question to Dean Fisher. May I, Sir?

Would it be fair to put your position this way, and I am sure you will correct me if I am wrong. You see little inherent power in the executive beyond recognition of arms dispatch agreements and this type of thing as far as an inherent power of the Executive to enter into international agreements?

Dean FISHER. Well, those are the only areas that would presently be defended as far as Presidential agreement is concerned, other than the inevitable thing of modalities, arranging meetings between heads of state, and that kind of thing, all kinds of things that are not substantive and legal, as far as creating international commitments. Obviously the President has to have the authority to talk to, to say to the Japanese, look, unless you do this, I will be unable to get this thing through Congress. And there are certain problems of authority in the Chief Executive in operating within the existing political structure, and in which he will make understandings with other heads of states. I mean, now those understandings may not, may not come under the definition of international agreement in this section, but he has to have the ability to make international sort of arrangements with other heads of states. I am suggesting that occasionally they do come under this definition, and he gave the commitment never again to press for a two-China solution as an illustration where we are bound now not to do that as a result of Presidential observation.

Professor MILLER. May I ask just one more question, Dean? Can I infer from your testimony, sir, that you have some fairly serious policy reservations about such a bill as compared with maybe the legality of power?

Dean FISHER. Yes, I do.

Professor MILLER. Would you comment on that, please?

Dean FISHER. Yes. Well, it seems to me that the authority to enter into executive agreements dealing with existing acts of Congress should be analyzed on sort of an authority-by-authority basis whether or not it is better to have that authority to come to an agreement, or it is better to have that authority to come to an agreement in 60 days if both Houses of Congress do not disapprove it. I have not analyzed, and I do not know whether this committee has been able to or not. every executive agreement entered into in, say, the last 5 years. I could not even give you a recount of every executive agreement entered into from 1949 to 1952, when I was the Chief Legal Officer of the Department of State. I was not seriously concerned about those agreements because they were based on existing authority to Congress and because they had been worked out in the relevant congressional committees. We had an argument once about an air bilateral with Canada that got into litigation with Colonial Airlines, but I would suggest where there is existing congressional authority that before that authority be modified, that it be sort of analyzed on a case-by-case basis rather than across-the-board basis. Personally I think this argument, strangely enough—this may seem strange—gives a little too much to the Executive in the areas where they want to enter into an executive agreement which requires congressional—which I think would require congressional—approval because this seems to say you can go ahead and do it, and unless both of us tell you you cannot get it through, you have got it. I would have been delighted to have been operating, and forgive me for saying this, going back to the St. Lawrence Seaway, Mr. Chairman, but I am an old public power man, and that was dear to my heart, and I would have been delighted if when I was assisting Mr.

Acheson in this operation, to have proceeded under this provision with the St. Lawrence Seaway, rather than trying to persuade both Houses of Congress to give us approval. It would have been much, much easier, and I have a feeling we could have made it because a majority in both Houses would not have opposed it. As it was, we did not. So, I think my own problem about it is, my own policy reservation is that it is a little bit too much across-the-board. That is, I say that excluding the informational part of it, which I think is absolutely great, and I think the sooner that is done, the better. That is because that would have been a great relief, and also, you know, so many times, particularly when you have to explain why something is secret, the reason for keeping the secret disappears, and having to explain to the Congress then why an agreement should be made public, I think, is going to have a very great prophylactic effect, and it is going to be good. I am repeating myself, now, but you have no greater fan in the city of Washington than me on that. On the 60 days, both Houses of Congress, I think it is a little bit too much across-the-board, uncovering four really different types of animals, and strangely enough, the constitutional problem that I have is really the strongest, and the least of the animals, the Presidential agreement based on solely Presidential power, and the one that gets people the maddest usually, because it is an assertion. Here you are talking about Yalta, and people did not get mad at the time about the Hull-Litvinov agreement, but like I said, by 1954 they had worked up a real head of steam on it, and since it deals with four separate problems on basically an across-the-board basis. I think it would hamper the Executive, and in some ways give them a free hand, more than they deserve, and it would have given me a ride, a better ride than I deserved if I had had this sort of basis to get it through rather than that long, slow road that we did not make.

Professor MILLER. Then I take it you would suggest that the bill is actually too lenient?

Dean FISHER. In some aspects it is.

Professor MILLER. And perhaps too rigid in others.

Is there any place in the executive branch proper for all of these executive agreements to be centrally located? We were told yesterday that truckloads of them might come up to the Congress if this bill was passed. Now, if that happens, where do the truckloads come from?

Dean FISHER. With some exceptions, they could have agreements based on military application and principles, they should be at the other end of the avenue with the assistance legal adviser for the Department of State for treaty affairs. You have probably seen him up here from time to time. His name is Charles Bevans. He has been in that position since 1950, a considerable time, considering the period I was the head of that division, the Legal Advisors' Office, from 1949 to 1952, which indicates we at least have an acquaintance, and he is career servant of highest quality. He is not a political figure. He is a career public servant. And I say when I look back on my period at the State Department in varying degrees, and am asked, what did you do that you were proud of, I will say at least I appointed Bevans to that job, and he is a good man.

Professor MILLER. How many people does he have appointed to handle these truckloads of documents?

Dean FISHER. I do not know. I guess that he has an office staff of about 20 to 30 people, and the distinction between professional and clerical in that office is a little bit more blurred than it is in a great many Government offices.

Professor MILLER. All right. One further and final question. The subcommittee heard testimony yesterday that the President has power under his agreement-making power, as Commander in Chief, to send 50,000 troops anyplace he wants to in the world, and to commit them to battle, including Vietnam and elsewhere. What would be your position on that?

Dean FISHER. Well, the only time I have dealt with that professionally was in Korea, where I supported the President's power to intervene in Korea. I am frank to confess that by the time I got around to supporting him, it had already been done, so my support really did not make much difference one way or the other. So, I think there is some Presidential power to react in the event of an emergency, and there is some inhibition to it about if you do not get congressional authorization. I felt for a long period of time, and I recommended that President Truman get congressional authorization after the fact. It could have been done, and for a long period of time, I was sorry that it was not. Having heard all of the discussions of the Tonkin Gulf Resolution, I am glad I did not prevail on that issue, because probably the Congress was madder for having gotten them in it rather than having the executive branch doing it on their own. There is bound to be some authority. You know, you have all seen that long row of opinions, and every legal adviser writes it up to date by adding a couple of more, and starting with the Boxer Rebellion and going through intervention, and President Johnson added the Dominican Republic on the basis of Presidential power. He can do something. Obviously how much he should do before he gets a declaration of war, in my judgment, in the last analysis, is a political question, and anyone who had made a correct judgment on this that cannot be second-guessed, I would have to stand up and applaud and cheer, because it sure would not be me. When I say my support of the Korean thing was as a reasonable legal adviser did not make any difference, they did not sit around and say, what do you think, and Fisher says go ahead, so all right, go ahead.

Senator ERVIN. Which indicates a certain kinship between the President's expression of faith and the man who was in jail, and summoned his lawyer, who got down to the jail and asked him about the reason he was there. The lawyer said, "They cannot put you in jail for that." But the fellow said, "Well, here I am."

Mr. EDMISTEN. Dean, you apparently have more faith in the executive branch than I do. In the last sentence of your statement, you say that "it seems to me the public outcry made necessary by its publication or by the advice to the Congress as provided in S. 596 would, I believe, suffice to prevent this limited authority to enter executive agreements from being abused." Now, I notice with the Case bill on executive agreements, which passed the Senate unani-

mously, and also his resolution on the Azores and the Bahrain resolution passed very substantially, that the executive branch has not done a thing about appeasing the Congress. As I understand it from the staff members on Foreign Relations, they have not so much as consulted with them. Therefore I just do not have the faith you have in the executive branch as being a cooperative body.

Dean FISHER. I'll tell you what, Mr. Edmisten, I probably am repeating myself, but I remember once during the war that I was to sign a consent, and I said, "They can't make me sign the consent," and they said, "No, lieutenant, they cannot make you sign the consent, but they can certainly make you wish to hell you had." It seems to me that if the Case bill or provisions of Senator Ervin's bill are passed requiring the transmission of the information, and that is going to be lived up to, I do not have any doubt about that. I have watched, and coming from the Joint Committee on Atomic Energy on a bill requiring transmission of information across the board, I think it could be lived up to. Now, that means you have got—I think it is great—that means you have got one step in, and that means that you are full partners as far as the information is concerned, the Congress is. Now, under those circumstances, the ability to raise a real storm is considerably greater than if you are not quite sure what you are talking about, and I say I have more confidence in the executive branch than you do, and maybe I have spent part of my life in it, and although I know my immediate colleagues do not seem to be in charge right now, but my faith is limited in any of their ability to react to pressures. And I think the informational part of this bill is an essential part of a necessary pressure. I think it is a must, and it seems to me, you know, that I am sure there are going to be people who are going to try to bluff you out by saying what a terrible job it will be in bringing up the documents, and it will be a terrible job. Well, this is too bad. You know, as Professor Miller says, you have got to start someplace in the Government, and how about giving us a copy. That is not so bad. And I would hope that the enthusiastic support of that portion would be agreed to in the House of Representatives. I would hope the other body would agree to that part of the bill, and that it would become law right away, because I support it enthusiastically.

Senator ERVIN. I think there is something in what you say, as we have experienced lately as a result of my demand that one of the Presidential aides come down and testify before the Judiciary Committee. I think what you say is true.

Dean FISHER. They were afraid you could make them wish they had.

Senator ERVIN. I want to thank you very much for your appearance here. Out of your vast practical experience as Chief Legal Adviser to the State Department, and out of your very profound study of this subject, you have made some very substantial and helpful contributions to our study.

Dean FISHER. Thank you very much, Mr. Chairman, and I was honored by being invited.

BIOGRAPHICAL INFORMATION—ADRIAN SANFORD FISHER

Born: 1914

Education: A. B. Princeton University, 1934; LL.B. Harvard University, 1937; and, LL.D. Princeton University 1965.

Experience: June 1969—Dean, Georgetown University Law Center; 1961–69—Deputy Director, U.S. Arms Control & Disarmament Agency; 1955–61—Vice President & Counsel, The Washington Post Co.; 1953–55—Assoc., Covington & Burling; 1949–53—Legal Adviser, Department of State; 1948–49—General Counsel, Atomic Energy Comm.; 1946–48—Solicitor, Department of Commerce; 1945–46—Technical Adviser, International Tribunal, Nuremberg; 1943–45—U.S. Army Air Force, Capt; 1941–42—Assistant to Assistant Secretary of State, Dean Acheson; 1940–41—Atty. TVA; 1939–40—Atty, Public Utilities Div., SEC; 1938–39—Law Clerk, Justice Frankfurter, U.S. Supreme Court; 1937–38—Law Clerk, Justice Brandeis, U.S. Supreme Court; and

Admitted: Tennessee Bar, 1938; District of Columbia, 1954.

Member: American Law Institute; American Society of International Law; and Council on Foreign Relations

Consultant: U.S. Arms Control & Disarmament Agency, 1969.

Mr. EDMISTEN. Mr. Chairman, the next witness is the Honorable Stuart Symington.

STATEMENT OF HON. STUART SYMINGTON, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator SYMINGTON. Thank you, Mr. Chairman. I rearranged my schedule in accordance with the wishes of your staff.

Senator ERVIN. Well, Senator, I want to welcome you to the subcommittee and express our deep appreciation for your willingness to appear and give us your views in a field with which you have been very much concerned both as a member of the Senate Armed Services Committee, and also as a member of the Senate Foreign Relations Committee.

Senator SYMINGTON. I appreciate that. May I say with respect that this is my 28th year in government, counting service in the executive branch, and I know of no hearings that have been held by the Congress since I have been in government which to me are more important than the ones you are currently holding. Let me congratulate you for the information you are obtaining for the benefit of the people in this country.

Senator ERVIN. Thank you, sir.

Senator SYMINGTON. Mr. Chairman, more than 2 years ago, the Foreign Relations Committee began to examine the nature of worldwide undertakings of this Nation and it has been my privilege during this period to serve as chairman of the subcommittee investigating U.S. commitments and security agreements abroad.

Some of the matters uncovered by this subcommittee would appear relevant to this important study by this Judiciary Subcommittee of the legality of the use of executive agreements from the standpoint of the Separation of Powers doctrine. Let me therefore briefly review just a few of the major revelations which, before our hearings were held, were unknown to the American public and to most of the members of Congress.

First, a 1966 agreement with Korea under which South Korean troops went to South Vietnam and the United States paid for clothing, oil products, gasoline and tires for Korean forces in Korea from MAP funds.

May I add that the reduction in the Korean forces in Vietnam at this time, South Vietnam, is nothing in percentage compared to the

reduction of forces of the United States; and we of course pay for both operations.

Second, a 1960 agreement with Ethiopia which in 1970 our subcommittee learned included a commitment to that government to support its 40,000 man army, along with a pledge for continued military assistance. As a matter of possible interest, by the end of this fiscal year, our support to Ethiopia will have cost the American taxpayer \$169.4 million.

Third, the secret annexes to the 1953 Spanish base agreements which limit the manner in which those bases can be used.

In our dealings with foreign nations many constitutional scholars have observed the marked trend during this century of substituting international executive agreements for treaties.

May I say, Mr. Chairman, that I was especially interested in the figures in the paper this morning, where you stated that as recently as 1930 the United States concluded 25 treaties and only nine executive agreements, in contrast to 1968, where the United States concluded 16 treaties and 266 executive agreements. And by January 1, 1972, the United States had a total of 947 treaties and 4,359 executive agreements.

Let us hope the American people pay unusual attention to those figures.

At one time, as these figures indicate, the United States submitted its major international policy agreements by treaty, leaving less important matters for executive agreements. That is no longer true, as is borne out by the findings of the Commitments Subcommittee.

We found that the United States now maintains 375 major bases, plus more than 3,000 minor installations, all around the world. A large number of these were established through executive agreements or understandings. Many of them were unknown to the American public and to most Members of Congress.

I am sure we will all agree that no matter which branch of government one serves, and regardless of a particular point of view, knowledge of the facts and circumstances is an essential predicate to any effort to formulate foreign policy.

Let me repeat here what was said in our Commitments Subcommittee report of December 21, 1970, regarding the foreign policy responsibilities of the legislative branch:

The responsibility not only includes a continuing study of the broad implications of policy, but also the activities incident to the operation of that policy. It is the day-to-day implementation of policy which frequently and sometimes almost imperceptibly provides the building blocks for further commitments.

A second and equally important responsibility which Congress shares with the Executive Branch is to disclose to the American people activities the United States has undertaken and is undertaking around the world.

Only as the result of information presented by the Executive Branch or otherwise obtained can the Congress review, authorize, and thereupon appropriate funds to implement policies and only through such information can the American people judge the activities of their government and plan the role reserved for them in our democratic structure.

It would appear clear that, regardless of intent, when executive agreements rather than treaties are utilized, the tendency is to keep the Congress in ignorance of the very facts the Congress must know in order to sensibly exercise its responsibilities about foreign affairs.

Otherwise what should be a shared power can become, in effect, an exclusive power of the executive branch; and the Nation loses the benefit of that collective judgment which is the hallmark of a democratic society.

There is no greater way to undermine the constitutional separation of powers, in this or any other field, than to permit one branch of government to sit in judgment of its own decisions, with no accountability to the other two.

Extended use of the executive agreements in international affairs affords the executive branch the potential opportunity to exercise almost complete control over these affairs, as well as the power to withhold knowledge of their very existence.

I would ask, how many Americans know today that we have thousands of Americans that the taxpayers pay for in Ethiopia, actually thousands of Americans in Eritrea, a place in the caldron of potential trouble in the Middle East, just south of Yemen, just east of the Sudan; a country which has a government in absentia in Damascus, Syria probably the closest Arab country to the Soviet Union at the present time.

If the Congress is to meet its constitutional responsibilities in the field of foreign policy formulation, it must equip itself with the tools to carry out that responsibility. We cannot be too often reminded that it is the day-to-day implementation of policy which frequently, sometimes almost imperceptibly, provides the building blocks for future commitments.

One such tool is the national commitments resolution. Another is the war powers legislation which was recently approved by the Senate.

Another step forward was taken when the Senate approved S. 596, a bill offered by Senator Case to require that the text of subsequent international agreements other than treaties be transmitted to the Congress.

The legislation offered by Senator Ervin, by you, Mr. Chairman, and now before this subcommittee is along the lines of the Case bill, but it has one extremely important addition. S. 3475, which you introduced, not only requires transmittal of any executive agreement to the Congress or committees but conditions the coming into force of such an agreement on the congressional opportunity, and decision, not to disapprove said agreement within 60 days of submission.

Without question, this proposal represents the high-water mark in meaningful effort by the Congress to reassert its proper role in helping with the construction of our foreign policy block by block—rather than by approving or disapproving the building, either after it has been completed, or when it is in a state of near collapse.

It was former Secretary of State Dean Acheson who some 15 years ago, Mr. Chairman, stated that the greatest single change in the Government of the United States in this century was further delegation of authority by the legislative branch to the Executive. If that statement could be made by an intelligent, informed Secretary of State 15 years ago, prior to the Kennedy, Johnson, and Nixon administrations, I would ask everyone to consider how much more justification there is now for making such a statement.

I am on the Armed Services, Foreign Relations, Military Appropriations Subcommittee, and am often in ignorance about how such matters are being handled by a very very few people. As example, there was a base where there were thousands of Americans. One of the services felt the work being done there could be done for considerably less money at another base, and so recommended that second base. This matter was considered, discussed, and rejected by the Congress. I thereupon made a plea in the committees just mentioned for its reconsideration, heard nothing about it from that time on. Later, months later, I found out that the compromise made was to keep the base where these thousands of Americans were already stationed, and also to buy the new base, at a cost of many millions. This particular case, in my opinion, was but another illustration of duplication and waste of the taxpayers' money, trying to satisfy everybody about everything and refusing to give up anything established, entrenched might be a better word.

It is no problem to show that the taxpayers of the United States have been wasting billions upon billions of dollars. I have been on the Armed Services Committee, and have had the privilege of sitting next to you for many years. When we attempted to find information about the true status of our power, our nuclear military power, in Europe, on the Foreign Relations Committee, we were told that under the law, the information could not be given to us. Our Committee lawyer disagreed, but it is difficult to compete with the "from on high" legal opinions of the executive branch. So, I went on the Joint Atomic Energy Committee after the sad passing of Senator Russell. I did not really want to do so because it required my leaving the Joint Economic Committee, under the rules, but I did so for just one reason. I thought, having been on the Armed Services Committee for 18 years, it was important for me to know the truth about the strength of the United States, denied upon request. Nor was this information available to the Armed Services Committee.

Under Section 202 of the Joint Atomic Energy Act, however, the members of the Joint Atomic Committee are in a unique position, because the act states they must be kept concurrently informed of all nuclear developments and programs. They not only have to answer our questions, but have to voluntarily keep us informed. It is a fair statement which I have said before, and repeat, that in a 6-day trip to Europe, suggested by the Chairman of the Joint Atomic Energy Committee, Senator Pastore, I learned more about the true nature of U.S. military strength in Europe than I had in 18 years as a member of the Armed Services Committee. I was thinking of all that this morning, at a hearing incident to the confirmation of the new Ambassador to Germany, because the drain on the American taxpayer of these troops in Europe has never been properly presented from the standpoint of their true military value. Every American should know that you or I could walk in this room with a Hiroshima bomb in each hand. There should be no secret about such a fact the result of tremendous development of blast as against weight. This is a subject Dean Fisher is far better informed on than I. The degree as well as the nature of all this secrecy I have concluded, in my own mind, is in order to perpetuate billions of dollars

of waste of the taxpayers' money when it comes to any true analysis of military strength.

Under its terms, and these are the terms of your bill, Mr. Chairman, not only would the Congress be kept informed, it would also have the opportunity to pass judgment, and that would be all to the good because it would be in the letter and spirit of the framers of the Constitution.

Thank you and the committee for your courtesy in listening to me this morning.

Senator ERVIN. We often say that the first amendment is designed to give us an enlightened and knowledgeable electorate. As Chairman of the Commitments Subcommittee of the Senate Foreign Relations Committee, you have rendered services of an inestimable value to the Congress as well as the American people by some of the things you have been able to reveal as being carried on under executive agreements, not only without knowledge of the American people, but without knowledge of their representatives in the Congress.

Senator SYMINGTON. I do thank you, Mr. Chairman. One of the significant points you are presenting to the American people is the vital importance to this Nation, if it is to survive and prosper, to realize that military restraint is not the sole aspect of true national security. To me, military strength can be divided properly into three major components. First is the capacity to destroy any enemy when you are attacked, along with certainty on your part that he knows you can. In that field today, I think we are in good shape. Equally important under our system, is a viable economy, with a sound dollar. That component part of national security I think is weakening, getting worse instead of better. Finally, what I believe is wrapped up in these hearings of yours is credibility, faith of the people in their Government. If they lose that, it does not make any difference how strong you are in other fields I do not think the country will long survive. It is essential for the American people to realize what you have brought out from the standpoint of the rights of the Congress under the Constitution, that we must have a meaningful position in decisions not only incident to military strength, where there is a great deal of support from various components of our society, but also in policies incident to economic strength, and above all in the importance of having our people maintain faith in their Government.

Senator ERVIN. Thank you.

Did you have some questions?

Professor MILLER. May I ask you one question, sir?

Senator SYMINGTON. Yes, indeed.

Professor MILLER. As a member of the executive branch for a number of years at a high-level position, could you comment on whether or not legislation such as this would unduly hamper the executive in its conduct of foreign relations?

Senator SYMINGTON. I not only do not think it would hamper the Executive, Mr. Miller, I think it would help the executive branch. I do not think that we would be in the mess—and I use the word advisedly—that we are in today in Vietnam. This morning we had a status hearing on what is going on in Veitnam today, before the

Armed Services Committee. If we pass this kind of legislation, in the future we will not get into this character of problem. If you add the \$140 billion, that we put into Vietnam and the environs in Southeast Asia, to the total amount of military money we have put into Europe since World War II, you reach a figure greater than the national debt. This would never have happened if this type and character of proposed legislation had been on the books.

The figures I quoted from Chairman Ervin about these agreements are the reason we have some 375 major bases abroad, and 3,000 minor installations. That is what is cutting the very guts out of our economy, our financial position as a Nation. It was only some 20 years ago that we had \$24½ billion in gold; and owed \$7 billion redeemable in gold. Today our gold has gone from \$24½ billion down to \$10 billion. Depending on how you figure it, in effect, I think it is between \$30 billion and \$60 billion in current liabilities debt. Any banker is interested in one thing when you ask for a loan, that is your net current position. From the standpoint of a corporation, this nation is totally insolvent.

I have two great cities in my State. Both are bankrupt, according to their mayors. The State cannot spend more than it takes in, therefore, everybody comes down here to Washington where we have the most modern printing presses in the world. I do not think it will stop unless the executive branch makes the Congress a full partner in the where and why and how about money going out. That is why I think this legislation would also help the executive branch. We should be allowed to share the responsibility.

Professor MILLER. Thank you, sir. No further questions.

Senator ERVIN. Senator, we are greatly indebted to you for your appearance here and your thoughtful testimony that you have given us. And I sincerely hope that this committee, and in conjunction with the Senate Committee on Foreign Relations, will find a solution to the problem which is embraced in the Case bill and embraced in this bill. Thank you.

Senator SYMINGTON. Thank you, Mr. Chairman. Many of us look to you as our leader in this field, and we wish you the best of success.

Senator ERVIN. Thank you, sir.

Senator SYMINGTON. Thank you.

Senator ERVIN. Will counsel call the next witness?

Mr. EDMISTEN. Mr. Chairman, we may not have time, but I would like to call Prof. John N. Moore of the School of Law of the University of Virginia. He has been an expert in this field for quite some time. Perhaps we will not get through, but I think it would be wise to start.

Senator ERVIN. I wish to welcome you to the subcommittee and express our deep appreciation of your willingness to come and give us the benefit of your vast study of this subject. We certainly are grateful to you.

STATEMENT OF PROF. JOHN N. MOORE, SCHOOL OF LAW, UNIVERSITY OF VIRGINIA

Professor MOORE. Thank you, Mr. Chairman. It is a great pleasure to be here. I prepared a written statement for the record, but

since the statement is rather lengthy, and the time is short this morning. I think it might be preferable if I tried to summarize the basic points in my statement, and then, if you would like to come back and talk about any of the sections in the statement, we can do that.

It is a pleasure to appear before the Subcommittee on Separation of Powers to discuss executive agreements and the congressional executive relations in foreign affairs.

There are four principal issues that I would like to focus on this morning. The first of those is the constitutional basis for executive agreements. The second is the scope of authority to conclude executive agreements, and the third is the scope of congressional authority to regulate executive agreements. And finally, I would like to apply these principles to the legislation which is before the committee.

Before we turn to the four issues, I would like to make clear first, what the issue is not. The issue is not the international aspects of executive agreements versus the treaty power. In terms of their international legal effect, they have essentially the same effect. In terms of their international political effect, there may well be differences in terms of the kinds of signals that one is sending to another nation, and customarily a treaty commitment has meat. We are signaling a very important kind of commitment. That does not mean that executive agreements cannot always be important, but certainly when you choose the treaty form, it signals an important commitment.

Turning to the constitutional issues, and it really is a question of the authority of the President, and the President and the Senate, and the President and Congress to conclude international agreements. Let us look first at the constitutional basis for executive agreements. Article 2, section 2 of the Constitution provides that Congress shall have power, the Senate, that is the President shall have power to conclude international agreements by and with the consent of the Senate, provided that two-thirds of the Senators present concur. The record of the Constitutional Convention does not tell us what a treaty is within the meaning of this provision, nor is there any evidence that the Convention, in it, that the treaty power was to be the only constitutional procedure for concluding international agreements.

Moreover, more important, the treaty powers seem to be a kind of implicit clash with the specific grants of authority to both Congress and the President, which strongly implied for their effectuation and inherent power to conclude international agreements pursuant to those specific grants. Now, the Congress itself interpreted the Constitution in that way as early as 1792 when it passed an act delegating responsibility to the Postmaster General to conclude international postal agreements.

Now, whatever the initial understanding of the framers, it is very clear after 180 years of constitutional practice, that the executive agreement is a constitutional modality of concluding international agreements. If we look to the very substantial constitutional practice these figures here are interesting. As of January 1, 1969, the United

States had in force 1,909 major treaties, and 300, or rather 973 major executive agreements, or a ratio of almost four executive agreements to every treaty. If we look to the number of executive agreements concluded, and reprinted in the official series since April 1955, or from 1955 through April of 1972, there are approximately 5,591 executive agreements that have been concluded in that period.

The Supreme Court authority also supports the constitutionality of the executive agreement. There are at least two cases squarely on point, the *Belmont* and *Pink* case. And there is no case to my knowledge that has ever held that an executive agreement is invalid because it did not follow the procedures of the treaty power.

Let us shift then to the second of the issues, which really is the major issue, and that is the scope of authority to conclude executive agreements. Now, the Constitution did not tell us what a treaty meant, so we have a variety of tests that have been propounded by different scholars. On the one extreme, we have an importance test, in which it is asserted that only important agreements can be concluded by virtue of the treaty power, and the unimportant agreements are left to the executive agreement power. This, I think, when one first looks at it, seems to make a great deal of sense, because why did we have this extraordinary majority in the Senate required unless it was to be something that was quite important. On closer analysis, however, I am deeply troubled by this, and I think it would not stand either analytically or from a policy perspective.

In the first place, it is not responsive to the principal kind of argument for the executive agreement. This constitutional basis, which is that executive agreements are inherent in the kinds of specific guarantees to Congress, and the President with the treaty power, so that there is nothing in those guarantees that suggest that Congress or the President only has the authority to make unimportant Commander-in-Chief decisions, for example, or unimportant decisions concerning the postal service.

Secondly, it is hopelessly unresponsive to the constitutional practice. There have been many very important international agreements made by the United States under the executive agreement power, both congressional executive power and Presidential power, and those include the annexation of Texas and Hawaii. They include the Korean agreement in 1949. They include the four-power Berlin agreement ending the Berlin crisis, and a variety of other agreements which we might go into. The scholars vie with one another for the length of the list that they can come up with on important executive agreements, but there are certainly very many.

The third difficulty I have with this important test is that it is really not responsive to the functional strengths and weaknesses in making the kind of allocation we are concerned with. Certainly our starting premise ought to be that there is a very important policy to be served by shared responsibility, and that is that there should be wide participation in decisions both by Congress and the Executive. It seems to me that the case for cutting down that policy, or taking a decision that would override that policy, must be based on some functional strengths of the executive branch which are stronger than that particular policy in certain cases. And that is sometimes, we

will say, the necessity of crises management, the need for speed, the need for secrecy when it is a genuine need for secrecy, which override this interest in shared responsibility. And that, in fact, is what the division of powers under the Constitution, it seems to me, is based on, that despite the enormous importance of some decisions made under the Commander-in-Chief power, we do say those decisions are entrusted to the Executive.

At the opposite extreme, if I can move to the second test for scope, we have a test that says that the scope of authority is one that is plenary in the President, and it is based on his inherent authority under the foreign relations power of the United States. We cannot dismiss this theory out of hand, since it is the theory which is held by some of the most thoughtful constitutional observers of treaty power, including Prof. Wallace McClure and Prof. Quincy Wright. I am somewhat troubled, however, by it because it seems to me it is based on several points that are not fully explained. One is that just because there is an inherent Federal power of foreign relations, it does not necessarily mean that that power is concurrent with Presidential as opposed to congressional power. We have still not divided up that power between Congress and the President. I think it is clear beyond doubt that the power is Federal and does reside in the States, and I think that basically the *Curtiss-Wright* decision, in suggesting that there was this inherent power, is basically going to a point though that there was, in fact, some suggestion that the power would reside in the Executive, and Hamilton certainly took that view.

The second thing that troubles me about it, I think, is it is too broad in terms of constitutional policies at stake. We are concerned with shared responsibility, and unless there is a good functional reason for setting aside that principle, then it seems to me we ought to maximize congressional participation.

Let me shift to the third scope of the subject matter test, and this is the one that I would embrace, and also the one that I believe is most widely shared today, and that is what I would call a subject matter test: and that is the President, only the President and Congress have the authority to conclude executive agreements in situations in which the agreement and the subject matter of the agreement is within their constitutional powers. That is, if you take the powers of the President constitutionally, you take the powers of Congress constitutionally, they can conclude international agreements that are inherent, that are incident to those particular powers.

Now, this test, it seems to me, is the one that is reflected in most of the case law on point.

It is implicit in circular 175, the State Department's procedure for choosing internally within the administration which kind of form is to be used, and it seems to me it would be the one most in keeping with our tradition of separation of powers. If we adopt the subject matter test, there are basically four different kinds of modalities then of concluding international agreements.

The first of those is the treaty, and under the treaty power, you can conclude any international agreement that is properly a subject of foreign relations with no basic limitation on the subject.

The second would be the executive agreement pursuant to treaty, which is nothing more than saying a treaty can delegate authority to the executive branch to conclude further agreements. I would call that an executive agreement pursuant to treaty. Some scholars call that kind of agreement itself a treaty.

The third category would be that the Congress and the President, acting together, even in terms of either a prior delegation of authority or in terms of subsequent approval, can act together to conclude an international agreement. I would call that a congressional-executive agreement. It must be concluded within the realm of the basic authority of Congress to act in general.

Lastly, the President can, within the area of Presidential power in general, conclude international agreements which are incident to those kinds of Presidential powers. And I would call that kind of an agreement a Presidential agreement, which is a particular kind of executive agreement.

Now, let us look very briefly at the scope of these, because once you put it in terms of subject matter, you still have to answer the question: Well, how much authority does Congress have and how much authority does the President have? In terms of congressional authority, there is some doubt still, I suppose, based on Mr. Justice Holmes' dictum in *Missouri v. Holland*, whether Congress has legislative authority that is coextensive with the treaty power. I am persuaded that today it does, and there is no area properly the subject of foreign relations that Congress could not deal with. Let us say, if it does not violate some other guarantee of the Constitution or the principle of separation of powers, if that is so, then congressional-executive agreements basically for constitutional purposes are essentially the equivalent of the treaty power.

With respect to Presidential agreements and Presidential authority, there are the usual sources here, the Commander in Chief power, the Presidential power as Chief Executive, his power as the principal representative of the Nation in foreign affairs, and his power to make sure that the laws are properly executed.

One point that I think is critical to make at this point is that we should not simply equate executive agreements with Presidential agreements. Of the 5,590 agreements which have been entered into by the United States between 1955 and April of 1972, the best indication that I can find is that only 64 of those agreements, or slightly over 1 percent of the total of agreements were concluded pursuant to solely Presidential authority. I think that fact is of major significance if we are concerned with the abuse of the executive agreement and legislation to try to get to whatever the problem may be!

Let me for a moment progress and try to deal specifically with the Spanish, Portuguese, and Bahrain base agreements, since I know this is an area that particularly concerns the Congress. The agreement with Portugal for the use of Lajes Field in the Azores would seem authorized pursuant to article 3 of the North Atlantic Treaty which contemplates joint efforts to maintain a capacity for individual and collective defense. Similar executive agreements have been concluded pursuant to the North Atlantic Treaty, and covering the defense of Iceland, the defense of Greenland, and providing military facilities

in Canada and Greece, as well as a prior agreement with Portugal, providing military facilities in the Azores. The North Atlantic Treaty aside, the base agreement with Portugal, as well as those with Spain and Bahrain, which are not within the NATO area, would seem to be within the independent authority of the President, as Commander in Chief, at least in the absence of legislation prohibiting such initiatives. The closest precedent would seem to be the destroyer for bases deal during 1940 by which President Roosevelt acquired base rights in New Foundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, and British Guinea, in exchange for the transfer to a sorely pressed Great Britain of 50 over-age destroyers. Prior to the agreement, President Roosevelt cautiously obtained the opinion of Attorney General Robert H. Jackson that transfer by Presidential agreement would be lawful. Although Jackson's opinion also relied on a somewhat stretched interpretation that existing legislation authorized acquisition of the bases, the opinion strongly suggested that the acquisition would have been constitutional even if concluded solely on the President's authority as Commander in Chief.

Similarly, there is substantial authority that the Commander-in-Chief power includes the authority to station the Armed Forces abroad, even in time of peace, which is a slightly different way of phrasing largely the same issue. The principal examples of this practice include President Roosevelt's actions immediately before U.S. entry into World War II in occupying Greenland with American forces and in arranging through an exchange of letters for the substitution of American for British forces in Iceland.

Let us go to the third issue, the scope of congressional authority to regulate executive agreements. Here it seems to me Congress can certainly terminate any delegation of authority which it has made to the Executive for the Executive to conclude international agreements. That simply is the kind of formal termination of the delegation of authority.

Secondly, I think Congress has the power to by specific legislation terminate the effect of international agreements, whether concluded by the treaty power or concluded by the executive agreement power.

In terms of the limitations on congressional authority, however, I think there are generally three, and they are inherent in the doctrine of separation of powers. The first of those is that it seems to me rather unquestionable that at this point that there are at least some areas that are exclusively within Presidential control. Those would include in a kind of hard-core minimum the conduct of hostilities during a major war. Secondly, the recognition of foreign governments, and third, I believe, the negotiation of international agreements, so at least it is within those areas of exclusive Presidential authority where there is no power of Congress to limit the power of the President in any way.

Secondly, the power of Congress is to investigate and to seek information about these issues. Also, it seems to me to be limited probably by the same kind of relevance test and subject matter test. If it is a subject matter which Congress does not have authority to legislate on, Congress probably does not have authority to make an investigation.

I doubt, for example, if they could investigate the executive branch in their operation of the combat and conduct of hostilities to take Hamburger Hill in Vietnam.

A third point is though Mr. Justice Jackson has strongly implied in his three categories in the steel seizure case, that when Congress acts against the President, any Presidential powers are at their lowest ebb; nevertheless, it seems to me questionable whether Congress can broadly withdraw a major area of independent Presidential authority as opposed to enacting legislation on a case-by-case basis. And that really, I suppose, goes to a kind of constitutional amendment saying that we are going to try to redraw the lines ahead of time in terms of which branch has the authority to conclude which kinds of agreements. And I am troubled by that, even in terms of Mr. Justice Jackson.

Senator ERVIN. I just have a signal that I have a rolleall vote, and I think perhaps this is an appropriate time to recess until 2 o'clock. Will that suit you to come back at 2?

Professor MOORE. That is fine. Mr. Chairman.

Senator ERVIN. Thank you.

(Whereupon, at 12:40 p.m., the hearing was recessed to reconvene at 2:00 p.m., this same day.)

AFTERNOON SESSION

Senator ERVIN. The subcommittee will come to order.

STATEMENT OF JOHN NORTON MOORE—Resumed

Professor MOORE. Any thoughtful observer must share the concern of Congress that it maintain a vigorous role in the conduct of foreign affairs, that it be more fully informed of the international agreements entered into by the executive branch, and that the Nation avoid involvement in foreign wars without the most careful appraisal. Nevertheless, it is my judgment that S. 3475, the principal legislation before this subcommittee, is both unconstitutional and unwise.

Whatever the test of the constitutional parameters of the authority of the President to conclude presidential agreements, it is clear that a bill which asserts congressional control over all executive agreements would encroach on the independent authority of the President. At least those agreements concluded pursuant to the exclusive authority of the President, such as agreements incident to the conduct of hostilities in wartime, are not validly subject to congressional control. For this reason alone S. 3475 would, if enacted, be unconstitutional. Moreover, even in areas where agreements validly concluded pursuant to Presidential authority must yield to inconsistent legislation, it seems improbable that they must yield to a concurrent resolution as opposed to an act or joint resolution having the force of law.

The bill also seems unwise. Thus, section 1(b) might be construed as a blanket delegation of authority to the President to conclude any executive agreement, subject only to obtaining a congressional majority to defeat each such delegation under the special procedures

of the bill. The wisdom of such a sweeping delegation without more explicit congressional consideration of each category of agreement, even if constitutional, is open to doubt. I would like to point out that the language of section 1(b) is rather broad there. It says: "Except as otherwise provided, any such executive agreement shall come into force with respect to the United States at the end of that first period of 60 days."

So, it seems to me that there is a strong case to be made of what in fact would occur is a very blanket delegation of authority to the President under the procedures of the bill.

Second, the bill would mean that no executive agreement could be concluded in less than 60 days and would mean at least a 60-day delay for all executive agreements other than those which by their terms are to take effect beyond 60 days from their conclusion. This delay would seem both dangerously rigid in situations of national opportunity and emergency and inordinately costly in the day-to-day conclusion of international agreements of a routine nature. For example, in the happy event of a negotiated settlement of the Indochina war it would seem beyond belief to be required by law to delay for 60 days the effect of an executive agreement ending the war—including the repatriation of American prisoners of war.

Third, as the last example implies, since even oral agreements may be binding on the Nation, and since many minor and unreported agreements are routinely entered into in the normal operation of a government, the breadth of the net cast by section 2, which includes any "international agreement or commitment, other than a treaty, which is binding upon the United States," may be so broad as to be unworkable.

Even if procedures can be devised for ferreting out and reporting all such agreements to Congress—at reasonable or unreasonable cost in time and resources within the executive branch—Congress would be deluged with a mass of trivia. Such a deluge is hardly responsive to the concerns which prompted the bill.

Lastly, except for agreements concluded pursuant to powers exclusively presidential, an area which cannot be invaded by any legislation. Congress already has constitutional authority to terminate executive agreements by passage of subsequent inconsistent legislation. Congress also has constitutional authority to control appropriations.

In summary, the procedures established by S. 3475 seem costly in a number of important respects yet achieve only marginal gains in the congressional role.

In conclusion, the overwhelming bulk of executive agreements are concluded pursuant to congressional or treaty authority. Thus for purposes of congressional-executive relations, the issue is not executive agreements versus the treaty power. The issues are instead what subject matter is properly a subject for presidential agreement and what presidential agreements must yield to inconsistent legislation. In answering these questions, there is the same strong interest in shared responsibility in the conduct of foreign affairs as in the Nation's domestic affairs. This principle should yield only when necessary to serve an equally compelling need for dispatch, decisiveness,

secrecy, crisis management, negotiating responsiveness, or some other need genuinely rooted in functional advantages of the Executive. Such needs seem compelling in regard to the conduct of hostilities, the recognition of a foreign government, and the negotiation of international agreements. For these areas, and there may be others, Executive authority should be and probably is exclusive. For most other areas, presidential agreements should and probably would yield to subsequent legislation.

In considering executive agreements, as well as the other issues in the current debate about the foreign affairs power, we might profitably heed Dean Acheson's timeless reminder that "[t]he central question is not whether Congress should be stronger than the President, or vice versa, but how the Congress and the President can both be strengthened to do the pressing work that falls to each to do and to both to do together."

The President should remember that congressional support is a prerequisite for a successful foreign policy. The President is dependent on Congress for legislative implementation and appropriations, can in some areas be legislatively curbed by Congress, and above all must have the national consensus which only strong congressional support can provide. Congress can also be a helpful forum for obtaining new ideas and for refining old policies. These realities suggest the importance of vigorous consultation with Congress and of informing Congress of Executive policies fully and candidly even if some lumps are taken in return.

The President should work out informal procedures to systematically inform Congress of all significant agreements.

In addition, congressional preferences to participate in the making of particular types of agreements should be weighted heavily even when the President has constitutional authority to conclude such agreements as Presidential agreements or pursuant to prior treaty or congressional authorization.

The Executive might also experiment with submitted to Congress for approval by joint resolution some of the military base agreements of greatest concern to Congress.

The Congress should remember that there are good reasons for Presidential leadership in foreign affairs. These include the facility of the Executive to act with speed and decisiveness, his capacity to respond with a high or low profile, to act with negotiating responsiveness and secrecy—when genuinely required, and to have access to more complete information. The recent China initiative by President Nixon illustrates all of these Presidential attributes. Finally, as the only elected official responsible to the Nation as a whole, the President has a unique responsibility and capacity for a unified foreign policy. This is not to suggest that Congress should forego vigorous debate of important foreign policy issues or close scrutiny of Executive policies. It is to suggest that Congress should cautiously assess claims of Executive usurpation of the congressional role in foreign affairs and should curtail Presidential flexibility only where there are compelling reasons to do so.

Congress can make known its interest in considering particular kinds of agreements, and can through hearings formulate policy

guidelines for the Executive. Drastic legislation or constitutional amendment, however, should be avoided. Present constitutional procedures, like the common law, have evolved from felt needs and the press of trying events. The resulting executive agreement has served us well and if we did not have it we would certainly have to invent it.

Thank you, Mr. Chairman.

(The full statement of Mr. Moore and footnotes follow:)

EXECUTIVE AGREEMENTS AND CONGRESSIONAL EXECUTIVE RELATIONS

(By John Norton Moore)

It is a pleasure to appear before the Subcommittee on Separation of Powers to discuss executive agreements and congressional-executive relations in foreign affairs. Corwin has written that the Constitution "is an invitation to struggle for the privilege of directing American foreign policy."¹ The ensuing struggle, evident throughout our history, has become especially intense at times of heightened international concern.

Washington's proclamation of "neutrality" in 1793 at the outbreak of war between France and Great Britain precipitated a classic debate between Hamilton, writing as "Pacificus," and Madison, writing as "Helvidius." Hamilton, in defense of Washington's proclamation, urged broad Presidential authority in foreign affairs:

[A]s the participation of the senate in the making of treaties, and the power of the legislature to declare war, are exceptions out of the general "executive power" vested in the president; they are to be construed strictly, and ought to be extended no further than is essential to their execution.²

Madison countered that Congress has broad authority in foreign affairs by virtue of its power to declare war and that the President's powers should be construed as instrumental only.³ Though Congress subsequently passed the neutrality act of 1794, history has in large measure confirmed the strong presidency envisaged by Hamilton.⁴

A second debate shook the country in the early 1950's in response to the hopes and fears occasioned by United States membership in the United Nations and the strains of an unpopular war in Korea.⁵ The focus of the debate was the Bricker Amendment, a proposed constitutional amendment which, in its principal form, sought to restrict the treaty power as a source of federal legislative authority to prevent international agreements from taking effect as domestic law without subsequent legislation and to restrict the President's authority to enter into executive agreements. The Bricker Amendment failed in the Senate by a margin of only one vote. Eighteen years later it is generally agreed that the Bricker movement proceeded on a variety of constitutional misconceptions and that adoption of the Amendment would have been a disaster.⁶

Just as the Korean War precipitated the Bricker debate so too the Vietnam War has precipitated a wide-ranging constitutional debate about the roles of Congress and the President in the conduct of foreign affairs. Issues in the debate all of which are currently reflected in pending legislation include the authority to commit the armed forces to hostilities abroad,⁷ the scope of the "executive privilege" to withhold information requested by Congress⁸ and the extent of congressional access to classified information⁹ as well as the immediate subject of these hearings the authority to conclude international agreements. The unprecedented scope of the present debate suggests that it may be the most important debate in the nation's history about the constitutional authority to conduct foreign affairs.

But if the Constitution has been an invitation to struggle equally clearly some issues in the struggle have been resolved. Thus it is generally agreed that the President has operational authority over the conduct of hostilities an authority on which Congress is powerless to encroach. Conversely, it is generally agreed that Congress must participate in the decision to authorize major hostilities abroad. Similarly, there is no doubt that executive agreements, validly concluded within areas of congressional or presidential authority, provide an alternative constitutional means for concluding international agreements.¹⁰

It is also clear that the President has substantial independent authority to conclude international agreements and that at least some such agreements are not subject to direct regulation by Congress. Let me illustrate each of these propositions about executive agreements and in the process attempt to shed some light on the scope of presidential and congressional authority to conclude international agreements.

THE CONSTITUTIONAL BASIS FOR EXECUTIVE AGREEMENTS

At the outset we should be clear what the issue is. It is not the *international* authority of treaties as opposed to executive agreements. At international law treaties and executive agreements are interchangeable and even an oral agreement may be as enforceable as the most solemn treaty.¹¹ The issue is instead the *constitutional* authority of the President, the President and the Senate, and the President and the Congress to enter into international agreements.

Article II section 2 of the Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur." This Executive-Senate treaty procedure may be used to conclude any international agreement, provided that it does not infringe the specific guarantees of the Constitution.¹² Though the record of the Constitutional Convention demonstrates that the treaty power was deliberately entrusted jointly to the President and the Senate there is nothing in the record that defines what is meant by a treaty or that forecloses alternative constitutional procedures for concluding international agreements.¹³ In fact, by differentiating in Article I section 10 between treaties and agreements, while mentioning only treaties in Article II section 2, the Constitution seems to imply a residual federal power to enter into international agreements other than by the treaty process. More important, the specific grants of authority to Congress and the President, as well as any inherent foreign affairs power, strongly suggest for their effectuation an included authority to enter into international agreements.¹⁴ For example, the grant of authority to Congress to establish postal services implies for its effectuation authority to authorize and approve international agreements for postal cooperation. As early as 1792 the Congress endorsed this interpretation by delegating authority to the Postmaster General to conclude international postal agreements.¹⁵

Whatever the original intent, one hundred and eighty years of constitutional practice and repeated rulings of the Supreme Court have established beyond doubt the constitutional validity of executive agreements.¹⁶ Professor Myres McDougal has concluded after the most thorough analysis of the agreement power to date:

No illusion as to the exclusiveness of the treaty-making clause, that is at all affected by intimations of reality, can survive the fact that of the "nearly two thousand international instruments" entered into by the United States between 1789 and 1939 "only some eight hundred were made by the treaty process."¹⁷

This reality seems even more compelling today. As of January 1, 1969 the United States was party to 909 treaties and 3,973 executive agreements, or more than four executive agreements for every treaty!¹⁸ And between 1953 and April 1972 the United States entered into 5,591 executive agreements sufficiently important to be published in the official series.¹⁹ It is evident from these figures that executive agreements are an indispensable tool of foreign relations, a reality recognized by Congress in 1950 when it established the official series *United States Treaties and Other International Agreements*.²⁰

The Supreme Court has consistently upheld the validity of international agreements other than treaties and, in fact, in *United States v. Belmont*²¹ and *United States v. Pink*²² has held that even Presidential agreements are the law of the land when concluded within an area of presidential authority. It is equally clear from a long line of cases that congressional-executive agreements are a constitutional modality of concluding international agreements.²³

Corwin summarizes the state of the present law when he says the essential question "is not whether the President can constitutionally enter into executive agreements with other governments—a point universally conceded—but what *scope* these may today validly take."²⁴

THE SCOPE OF AUTHORITY TO CONCLUDE EXECUTIVE AGREEMENTS

In the absence of more definitive guidance in the record of the Constitutional Convention, a variety of tests has been suggested for delimiting the scope of authority to conclude executive agreements. At one extreme it has been asserted that executive agreements are limited to unimportant as opposed to important agreements.²⁵ Aside from the futility of attempting to agree on what agreements are important, the importance test is not responsive to the principal constitutional basis for executive agreements. That is, the specific grants of authority to the Congress and the President seem to include authority to authorize or conclude those international agreements necessary to effectuate the grants. Moreover, constitutional practice will not support a distinction that only unimportant agreements may be concluded as executive agreements.

[T]he United States annexed Texas and Hawaii, ended the first world war, joined the International Labor Organization, the Universal Postal Union and the Pan American Union, settled over ten billion dollars worth of post-World War I debts, acquired Atlantic naval bases in British territory during World War II, acquired all financial claims of the Soviet Union in the United States, joined the United Nations pledging itself not to make separate peace in World War II and to accept the Atlantic Charter, submitted over a score of cases to international arbitration, and modified the tariff in numerous reciprocal trade agreements, by means other than the treaty-making process.²⁶

To Professor Wright's list might be added the Lawrence-Palmerston agreement of 1850 by which the Canadian Territory of Horseshoe Reef in the Niagara River was ceded to the United States, the 1898 peace protocol with Spain by which Spain agreed to cede Puerto Rico to the United States, the Boxer Protocol of 1901 authorizing occupation of Chinese ports by an international expeditionary force, the Taft-Katsura understanding of 1905 concerning the interests of the United States and Japan with respect to Korea and the Philippines, the 1908 Root-Takahira agreement concerning China policy and maintenance of the *status quo* in the Pacific, the termination of hostilities with Mexico in 1914, the Lansing-Ishii agreement of 1917 concerning the interests of Japan in China, the four-power agreement of 1949 ending the Berlin Blockade, the armistice agreement ending the Korean War, and so on.²⁷ Finally, the importance test is not wholly responsive to the reasons for separation of powers. Decisions entrusted to the President incident to his authority to conduct hostilities may be critical to the survival of the nation. Yet because of the need for speed, flexibility, and decisiveness in crises, such decisions are rightly entrusted to the Executive even though they may be enormously important. Where functional reasons inherent in the nature of Congress and the Executive suggest presidential or congressional predominance on particular decisions, the same reasons also support predominance in international agreements incident to such decisions.

At the other extreme, some of the most thoughtful constitutional observers, including Professor Quincy Wright, have urged that the constitutional authority to conclude executive agreements is plenary, stemming from the inherent foreign affairs power of the Executive. According to Professor Wright:

The scope of the President's power . . . is considered to be a political question upon the limits of which he himself is the judge at least in the first instance. It could never be said that the President was definitely acting contrary to Constitutional law in making an executive agreement unless it was absolutely certain that the agreement would not be carried out.²⁸

Similarly, Wallace McClure writes:

[A] case can be made for the President's constitutional authority to enter into and enforce any *bona fide* international agreement that is not in conflict with the Constitution regardless of congressional approval or at least if Congress does not by law dissent.²⁹

This theory of inherent presidential authority to conclude international agreements receives support from the opinion of the Supreme Court in the famous *Curtiss-Wright* case.³⁰ Mr. Justice Sutherland, writing for the Court, indicated that the foreign affairs power of the nation is inherent and does not depend on a specific constitutional grant of authority. More specifically, the power to make such international agreements as do not constitute treaties in the constitutional sense . . . which is [not] expressly affirmed by the Constitu-

tion, nevertheless exist[s] as inherently inseparable from the conception of nationality.³¹

One difficulty with the inherent presidential authority test is that it seems to assume, without adequate explanation, an equivalence between inherent federal power and inherent presidential power. More important, the test ignores the strong interest in shared responsibility underlying the separation of powers—an interest which should control in the absence of crisis or other functional basis for preferring presidential authority.

The preferable test, and one which seems to command the greatest contemporary support, is that the scope of authority to conclude executive agreements depends on the constitutional authority of the President and the Congress to deal with the subject matter of the agreement in question.³² That is, an agreement concluded solely on presidential authority must be within the President's power as Chief Executive of the nation, Commander-in-Chief of the army and navy, diplomatic representative of the nation, or some other general presidential power. And an agreement concluded with the authorization or approval of Congress must be within the general legislative competence of Congress. This subject matter test seems implicit in the Department of State "Circular 175 Procedure."³³ It is also the test most in accord with constitutional practice, the constitutional basis for executive agreements, and the nation's general tradition of separation of powers. Most important since a subject matter test reflects the existing functional division between Congress and the Executive, it is more responsive to the reasons for preferring congressional or presidential authority. Adopting the subject matter test, the scope of authority to conclude international agreements is as follows:

1. The President with the concurrence of two-thirds of the senators present may conclude an international agreement on any subject genuinely a concern of foreign relations. Such an agreement is a treaty;

2. The President may conclude an international agreement expressly or impliedly authorized by a valid treaty. Such an agreement is an executive agreement pursuant to treaty (one commentator refers to such agreements as treaties);³⁴

3. The President may conclude an international agreement expressly or impliedly authorized by prior legislation or subsequently approved by Congress on any subject within congressional legislative competence and genuinely a concern of foreign relations. Such an agreement is a congressional-executive agreement;

4. The President may conclude an international agreement solely on presidential authority on any subject within his independent authority and genuinely a concern of foreign relation. Such an agreement is a presidential agreement.³⁵

There is some question whether congressional authority to authorize or approve congressional-executive agreements may be more limited than the essentially plenary authority of the President and the Senate to conclude an international agreement. An early dictum of Mr. Justice Holmes, writing for the Court in *Missouri v. Holland*,³⁶ suggested that Congress may legislatively implement a valid treaty when it would not otherwise have legislative authority under its enumerated powers. This suggests that the treaty power is broader than the power to conclude congressional-executive agreements. On the other hand, *Missouri v. Holland* was decided prior to the enormous expansion of the legislative competence of Congress under the fourteenth amendment, the commerce clause, and the inherent foreign affairs power of the Congress. As a result, Professor Louis Henkin, one of the most thoughtful constitutional scholars of the foreign affairs power, has concluded that today the legislative authority of Congress would extend to any genuine concern of foreign affairs. That is, "the same factors which render a matter proper subject for a treaty may also render it appropriate for independent Congressional legislation under the federal foreign affairs power."³⁷ If so, and I would support his judgment, the Congressional-executive agreement is for constitutional purposes largely, if not precisely, the functional equivalent of the treaty.

Where Congress has authority over the subject matter of an agreement, it has broad authority to delegate authority to the Executive to conclude such agreements. In this respect the particularly broad authority of Congress to delegate to the Executive in foreign affairs, an authority based on the fact that most such foreign affairs powers are shared powers, has been repeatedly con-

firmed by Congress and the Supreme Court.³⁸ And though the practice is infrequent,³⁹ Congress probably also has authority to subsequently approve an executive agreement.⁴⁰

With respect to the independent authority of the President to conclude presidential agreements, authority stems primarily from the powers of the President to "receive ambassadors and other public ministers," to "take care that the laws be faithfully executed," as Chief Executive and Commander-in-Chief, and any inherent foreign affairs power entrusted to the President. These powers include authority to carry on the diplomatic relations of the nation, to recognize foreign governments, to settle claims by and against the United States, to negotiate international agreements and to supervise the conduct of hostilities. Recent agreements concluded solely on presidential authority include settlement of a variety of foreign claims by and against the United States—notably the Litvinov Agreement of 1934 by which the United States acquired Soviet assets located in the United States, the 1949 four power agreement ending the Berlin Blockade, the Korean Armistice Agreements of 1953, and agreements with a number of countries for deployment of United States naval vessels to foreign ports and harbors.⁴¹

For agreements which could be supported by constitutional authority under several modalities of agreement, the President may choose among them on the basis of political and other factors. Factors particularly significant in this choice include congressional preference, the importance of congressional involvement—particularly the need for implementing legislation or appropriations, and the degree of formality internationally desirable. For example, since the formalities of the treaty form signal major or long lasting international commitments (note that the converse does not necessarily follow) normally it would be inappropriate to use a treaty when it is internationally desirable to signal only a routine or short term commitment.

It is evident from the variety of constitutional modalities for concluding international agreements, executive agreements should not be confused with agreements concluded solely on presidential authority—that is, presidential agreements. The overwhelming bulk of executive agreements are concluded pursuant to prior or subsequent legislative or treaty authorization. For example, of the 5,591 executive agreements concluded between 1955 and April 1972 only 64, or a fraction over 1%, were concluded solely under the independent authority of the President.⁴² This ratio is particularly significant in evaluating the significance of executive agreements for the separation of powers or the need for general legislation to assert greater congressional control.

The recent hearings concerning the military base agreements with Spain,⁴³ Portugal, and Bahrain,⁴⁴ the recommendations of the Symington Subcommittee on Security Agreements and Commitments Abroad,⁴⁵ and the legislation pending before this Subcommittee⁴⁶ suggest that a central concern of the Congress is international agreements concluded pursuant to presidential initiative and not subsequently submitted to Congress or the Senate, particularly agreements involving the stationing of the armed forces abroad. In the absence of congressional authorization or approval, such agreements, to be valid, must be concluded either pursuant to treaty authorization or within an area of independent presidential authority.

The agreement with Portugal for the use of Lajes Field in the Azores would seem authorized pursuant to Article 3 of the North Atlantic Treaty which contemplates joint efforts to maintain a capacity for individual and collective defense. Similar executive agreements have been concluded pursuant to the North Atlantic Treaty and covering the defense of Iceland, the defense of Greenland, and providing military facilities in Canada and Greece, as well as a prior agreement with Portugal providing military facilities in the Azores.⁴⁷ The North Atlantic Treaty aside, the base agreement with Portugal as well as those with Spain and Bahrain which are not within the NATO area, would seem to be within the independent authority of the President as Commander-in-Chief, at least in the absence of legislation prohibiting such initiatives. The closest precedent would seem to be the destroyer for bases deal during 1940 by which President Roosevelt acquired base rights in Newfoundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, and British Guiana in exchange for the transfer to a sorely pressed Great Britain of 50 over-age destroyers. Prior to the agreement President Roosevelt cautiously obtained the opinion of Attorney General Robert H. Jackson that transfer by presidential agreement

would be lawful. Although Jackson's opinion also relied on a somewhat stretched interpretation that existing legislation authorized acquisition of the bases, the opinion strongly suggested that the acquisition would have been constitutional even if concluded solely on the President's authority as Commander-in-Chief.

Happily, there has been little occasion in our history for the interpretation of the powers of the President as Commander in Chief of the Army and Navy. I do not find it necessary to rest upon that power alone to sustain the present proposal. But it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense.⁴⁸

Similarly, there is substantial authority that the Commander-in-Chief power includes the authority to station the armed forces abroad even in time of peace, which is a slightly different way of phrasing largely the same issue.⁴⁹ Principal examples of this practice include President Roosevelt's actions immediately before United States entry into World War II in occupying Greenland with American forces and in arranging through an exchange of letters for the substitution of American for British forces in Iceland.

THE SCOPE OF CONGRESSIONAL AUTHORITY TO REGULATE EXECUTIVE AGREEMENTS

Congressional authority to legislate probably extends to any subject genuinely a concern of foreign affairs. Congress also can terminate a prior congressional delegation of authority to the Executive to conclude executive agreements. Similarly, Congress can terminate treaties or executive agreements by enacting subsequent legislation. Such legislation, however, could not lawfully terminate the *international* effects of agreements, and unless consented to by the other parties to the agreement such termination might both violate international law and undermine the credibility of national commitments. Congressional authority is further limited by the separation of powers doctrine which would prevent congressional encroachment on any exclusively presidential powers. Thus Professor McDougal indicates:

[I]f the subject of the agreement is a matter within the President's special constitutional competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander in Chief—a realistic application of the separation of powers doctrine might in some situations appropriately permit the President to disregard the statute as an unconstitutional invasion of his own power.⁵⁰

One authority analogously supporting this limitation on congressional authority is *Myers v. United States*.⁵¹ In the Myers case the Supreme Court held that legislation attempting to restrain the President from removing an appointed executive official was an unconstitutional invasion of the removal power of the President. This was so even though the initial power of appointment was constitutionally a joint executive-congressional power. The substantial authority that the conduct of hostilities is an exclusively presidential power⁵² also suggests that Congress may not regulate international agreements concluded pursuant to that power. More squarely on point, both President Lincoln and Wilson asserted independent authority to maintain certain international agreements in force despite contrary legislation. President Lincoln had earlier given notice to Great Britain of his intention to terminate the Rush-Bagot of 1817 providing for permanent limitation of naval armaments on the Great Lakes. In 1865 Congress adopted a joint resolution purporting to ratify his action. When British compliance with the agreement thereafter improved, Lincoln changed his mind and refused to terminate the agreement despite the congressional action. Similarly, President Wilson refused to comply with Section 34 of the Merchant Marine Act of 1920 directing the President to give notice of termination of provisions in international agreements restricting the right of the United States to levy certain discriminatory duties. Wilson urged that since the termination clause of the agreements authorized total but not partial termination the congressional action would require the negotiation of new agreements and was an unconstitutional interference with the Executive's authority to conduct foreign affairs.⁵³

At a minimum the separation of powers doctrine would preclude regulation of agreements incident to the conduct of hostilities, but there is substantial au-

thority that the prohibition also would extend to the recognition of foreign governments⁵⁴ and the negotiation of international agreements.⁵⁵ And according to at least one constitutional scholar, the prohibition would include the stationing of the armed forces abroad even in peace times.⁵⁶ At least with respect to the conduct of hostilities, the recognition of foreign governments, and the negotiation of international agreements, exclusive presidential authority seems strongly rooted functionally in the greater capacity of the Executive to act with dispatch, decisiveness, secrecy, and negotiating responsiveness.

The information-gathering and investigative function of Congress extends only to matters within the legislative authority of Congress. Thus, any regulation of executive agreements which requests information about executive agreements in such broad terms that it would also include a request for information related to agreements incident to the exclusive authority of the President, for example, agreements incident to the conduct of hostilities, might, at least in part, exceed congressional authority.⁵⁷

These considerations, as well as the form of the Bricker Amendment,⁵⁸ suggest that constitutional amendment rather than legislation would be the proper form of regulation which seeks to assert blanket congressional authority over executive agreements.

A BRIEF ANALYSIS OF LEGISLATIVE PROPOSALS CONCERNING EXECUTIVE AGREEMENTS

Any thoughtful observer must share the concern of Congress that it maintain a vigorous role in the conduct of foreign affairs, that it be more fully informed of the international agreements entered into by the Executive branch, and that the nation avoid involvement in foreign wars without the most careful appraisal.⁵⁹ Nevertheless, it is my judgment that S. 3475, the principal legislation before this Subcommittee, is both unconstitutional and unwise.

S. 3475 would require that "any executive agreement made on or after the date of enactment" be transmitted by the Secretary of State to the Congress. If the President determined that immediate disclosure of an agreement would "be prejudicial to the security of the United States" the agreement could be referred to the Foreign Affairs and Foreign Relations Committees" under an appropriate written injunction of secrecy." The Bill provides that all such agreements would then enter into force only if not disapproved by concurrent resolution within 60 days of transmittal. Finally, the Bill establishes special procedures to expedite congressional consideration of concurrent resolutions with respect to executive agreements.

Whatever the test of the constitutional parameters of the authority of the President to conclude presidential agreements, whether plenary or based on the specific powers of the President in foreign affairs, it is clear that a bill which asserts congressional control over all executive agreements would encroach on the independent authority of the President. At least those agreements concluded pursuant to the exclusive authority of the President, such as agreements incident to the conduct of hostilities in wartime, are not validly subject to congressional control. For this reason alone S. 3475 would, if enacted, be unconstitutional. Moreover, even in areas where agreements validly concluded pursuant to presidential authority must yield to inconsistent legislation, it seems improbable that they must yield to a concurrent resolution as opposed to an act or joint resolution having the force of law.⁶⁰ As a practical matter, I doubt that either of these constitutional defects is curable without both undermining the purpose of the Bill and creating enormous operational uncertainty in the day-to-day conduct of foreign affairs. Finally, as a minor constitutional defect, since Congress lacks legislative authority with respect to at least those agreements incident to a power exclusively presidential, Congress may not have authority to compel that all executive agreements be transmitted to Congress.

Aside from its considerable constitutional defects, the Bill also seems unwise. Thus, section 1(b) might be construed as a blanket delegation of authority to the President to conclude any executive agreement, subject only to obtaining a congressional majority to defeat each such delegation under the special procedures of the Bill. The wisdom of such a sweeping delegation without more explicit congressional consideration of each category of agreement, even if constitutional, is open to doubt.

Second, the Bill would mean that no executive agreement could be concluded in less than 60 days and would mean at least a 60 day delay for all executive

agreements other than those which by their terms are to take effect beyond 60 days from their conclusion. This delay would seem both dangerously rigid in situations of national opportunity and emergency and inordinately costly in the day-to-day conclusion of international agreements of a routine nature. For example, in the happy event of a negotiated settlement of the Indo-China War it would seem beyond belief to be required by law to delay for 60 days the effect of an executive agreement ending the War—including the repatriation of American prisoners of war! And to give an example from the day-to-day realm, it seems equally absurd to require agreements concerning the attendance of foreign dignitaries at the funeral of a national leader to be held up for 60 days pending congressional inaction.

Third, as the last example implies, since even oral agreements may be binding on the nation, and since many minor and reported agreements are routinely entered into in the normal operation of a government, the breadth of the net cast by section 2, which includes any "international agreement or commitment, other than a treaty, which is binding upon the United States," may be so broad as to be unworkable. As John Bassett Moore indicates:

The conclusion of agreements between governments, with more or less formality, is in reality a matter of constant practice, without which current diplomatic business could not be carried on. A question arises as to the rights of an individual, the treatment of a vessel, a matter of ceremonial, or any of the thousand and one things that daily occupy the attention of foreign offices without attracting public notice; the governments directly concerned exchange views and reach a conclusion by which the difference is disposed of. They have entered into an international agreement. . . .⁶¹

Even if procedures can be devised for ferreting out and reporting all such agreements to Congress—at reasonable or unreasonable cost in time and resources within the Executive branch—Congress would be deluged with a mass of trivia. Such a deluge is hardly responsive to the concerns which prompted the Bill.

Fourth, Congress and the President should work out an arrangement to systematically inform Congress of those executive agreements in which Congress has an interest. But it may be that requiring physical transmission of all such agreements to Congress, even under an appropriate injunction of secrecy, is insufficiently responsive to genuine security needs. Agreements, for example, which also deal with the precise location of nuclear weapons or strike forces located in foreign countries might be described in general outline without being physically transmitted to Congress. Without knowing more about the security procedures of congressional committees and the kinds of sensitive agreements which may be involved, it is difficult to evaluate the strength of this objection. But since presumably all agreements transmitted to the Congress could be the subject of committee and floor debate in both houses, it is difficult to see how the injunction of secrecy could be really effective. This objection applies to S. 596, introduced by Senator Case, as well as to S. 3475.

Lastly, except for agreements concluded pursuant to powers exclusively presidential, an area which cannot be invaded by any legislation, Congress already has constitutional authority to terminate executive agreements by passage of subsequent inconsistent legislation.⁶² Moreover, since Congress has constitutional authority to control appropriations, it seems likely that in most cases this basis alone would provide adequate grounds for congressional consideration of significant executive agreements. For example, appropriations hearings could have been scheduled with respect to the Spanish, Azores, and Bahrain base agreements.

In summary, the procedures established by S 3475 seem costly in a number of important respects yet achieve only marginal gains in the congressional role.

S. Res. 214, agreed to by the Senate on March 3, and S 3447, introduced by Senator Case on April 4,⁶³ are also dubious. Both seek to influence the Administration to submit the military base agreements with Portugal and Bahrain to the Senate as treaties. Without reviewing again the background of these agreements,⁶⁴ it is my judgment that the agreements are within the authority of the President as Commander-in-Chief, at least in the absence of inconsistent legislation, and that to use the treaty form for these agreements would exaggerate the permanence and importance of the international commitment. Neither agreement is a substantial departure from prior executive agreements sup-

ported by Congress nor are they intended to commit the United States to the defense of another country. And in the case of the Azores agreement with Portugal, the agreement, like numerous similar agreements, is rooted in section 3 of the North Atlantic Treaty. Moreover, though the determination of Congress not to allow United States participation in foreign wars without careful congressional appraisal is commendable, the fear that the Azores and Bahrain bases will themselves lead to involvement in foreign wars seems exaggerated. Certainly the Vietnam War did not result simply from the presence of United States bases in Vietnam. In so far as these resolutions require use of the treaty form for these agreements, then, S. Res. 214 and S 3447 seem premised on an erroneous conception of the constitutional exclusivity of the treaty power. They also seem unwise. The real issue is congressional involvement in the decision to conclude such agreements, not the form of agreement. And on that issue Congress can hold hearings on appropriations, or though it would certainly impugn the reliability of United States commitments and might precipitate a constitutional confrontation, Congress could pass an act terminating the agreements. The preferable solution is for full consultation prior to any such agreements so that such horrors can be avoided.⁶⁵

CONCLUSION

The overwhelming bulk of executive agreements are concluded pursuant to congressional or treaty authority. Thus for purposes of congressional-executive relations, the issue is not executive agreements versus the treaty power. The issues are instead what subject matter is properly a subject for presidential agreement and what presidential agreements must yield to inconsistent legislation. In answering these questions, there is the same strong interest in shared responsibility in the conduct of foreign affairs as in the nation's domestic affairs. This principle should yield only when necessary to serve an equally compelling need for dispatch, decisiveness, secrecy, crisis management, negotiating responsiveness, or some other need genuinely rooted in functional advantages of the Executive. Such needs seem compelling in regard to the conduct of hostilities, the recognition of a foreign government, and the negotiation of international agreements. For these areas, and there may be others, Executive authority should be and probably is exclusive. For most other areas, presidential agreements should and probably would yield to subsequent legislation.

In considering executive agreements, as well as the other issues in the current debate about the foreign affairs power, we might profitably heed Dean Acheson's timeless reminder that "[t]he central question is not whether Congress should be stronger than the President, or vice versa, but how the Congress and the President can both be strengthened to do the pressing work that falls to each to do and to both to do together."⁶⁶

The President should remember that congressional support is a prerequisite for a successful foreign policy. The President is dependent on Congress for legislative implementation and appropriations, can in some areas be legislatively curbed by Congress, and above all must have the national consensus which only strong congressional support can provide. Congress can also be a helpful forum for obtaining new ideas and for refining old policies. These realities suggest the importance of vigorous consultation with Congress and of informing Congress of Executive policies fully and candidly even if some lumps are taken in return.

With respect to presidential initiatives toward executive agreements, informal procedures should be worked out to systematically inform Congress of all significant agreements. In addition, congressional preferences to participate in the making of particular types of agreements should be weighted heavily even when the President has constitutional authority to conclude such agreements as presidential agreements or pursuant to prior treaty or congressional authorization. When feasible, the Executive might also experiment with submitting to Congress for approval by joint resolution some of the military base agreements of greatest concern to Congress.

The Congress should remember that there are good reasons for presidential leadership in foreign affairs. These include the facility of the Executive to act with speed and decisiveness, his capacity to respond with a high or low profile, to act with negotiating responsiveness and secrecy—when genuinely required, and to have access to more complete information. The recent China initiative by President Nixon illustrates all of these presidential attributes. Finally, as the only elected official responsible to the nation as a whole, the President has

a unique responsibility and capacity for a unified foreign policy. He may, for example, be more aware of the linkages between foreign policy programs. This is not to suggest that Congress should forego vigorous debate of important foreign policy issues or close scrutiny of Executive policies. It is to suggest that Congress should cautiously assess claims of Executive usurpation of the congressional role in foreign affairs and should curtail presidential flexibility only where there are compelling reasons to do so.

With respect to congressional initiatives toward executive agreements, Congress can make known its interest in considering particular kinds of agreements, and can through hearings formulate policy guidelines for the Executive.⁶⁷ Drastic legislation or constitutional amendment, however, should be avoided. Present constitutional procedures, like the common law, have evolved from felt needs and the press of trying events. The resulting executive agreement has served us well and if we did not have it we would certainly have to invent it.

FOOTNOTES

¹ E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS 1787-1957* 171 (4th rev. ed. 1957).

² Alexander Hamilton, "The Letters of Pacificus" *THE FEDERALIST ON THE NEW CONSTITUTION* 405, 410 (1857).

³ See James Madison, "The Letters of Helvidius," *id.* at 432.

⁴ See generally, E. CORWIN, *supra* note 1.

⁵ For the flavor of the debate compare F. HOLMAN, *STORY OF THE "BRICKER" AMENDMENT* (Committee for Constitutional Government 1954), with *THE BRICKER AMENDMENT: VIEWS OF DEANS AND PROFESSORS OF LAW* (Committee for Defense of the Constitution By Preserving the Treaty Power 1957).

⁶ Among other misconceptions rife during the Bricker debate were the belief that the treaty power was not subject to the specific guarantees of the Constitution, and the belief that the treaty power was substantially broader than federal legislative authority.

⁷ See, e.g., "War Powers Legislation," HEARINGS BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS, 92d CONG., 1st SESS. (1971); "Congress, the President, and the War Powers," HEARINGS BEFORE THE SUBCOMMITTEE ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENTS OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS, 91st CONG. 2d SESS. (1970).

⁸ See "Executive Privilege: The Withholding of Information by the Executive," HEARING BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE COMMITTEE ON THE JUDICIARY, 92d CONG., 1st SESS. (1971).

⁹ See "Transmittal of Executive Agreements to Congress," HEARINGS BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS, 92d CONG., 1st SESS. (1971), "Transmittal of Executive Agreements to Congress," REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS, 92d CONG., 2d SESS. (Report No. 92-591 Jan. 19, 1972). Subsequently, S 596 was passed unanimously by the Senate.

¹⁰ See generally on the authority to conclude international agreements E. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944); W. MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941); Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945); Garner, *Acts and Joint Resolutions of Congress as Substitutes for Treaties*, 29 AM. J. INT'L L. 482 (1935); Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States*, 35 ILL. L. REV. 365 (1940); McDougal & Lans, *Treaties and Congressional—Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L. J. 181-351, 534-615 (1945), reprinted in M. MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 404 (1960); J. B. Moore, *Treaties and Executive Agreements*, 20 POL. SCIENCE QUARTERLY 385 (1905); Wright, *The United States and International Agreements*, 38 AM. J. INT'L 341 (1944).

¹¹ According to the Harvard Research in International Law "the distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." HARVARD RESEARCH, *Law of Treaties: Draft Convention, with Comment* (1935), reprinted in 29 AM. J. INT'L L. Supp. No. 4 652, 697. See also McDougal & Lans, *supra* note 10, at 422-23. The form chosen may make an international political difference, however, since treaties normally signal a long lasting or major commitment.

¹² The case of *Reid v. Covert*, 354 U.S. 1 (1957), established the preeminence of the specific guarantees of the Constitution over treaty obligations.

¹³ See generally I-III M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1911). See also *The Federalist Papers*, *supra* note 2; L. ROGERS, *CONSTITUTIONAL ASPECTS OF FOREIGN AFFAIRS* (1944); C. ROSSITER, *1787 THE GRAND CONVENTION* (1966).

¹⁴ See, e.g., McDougal & Lans, *supra* note 10, at 448-60. Constitutional powers such as "to regulate foreign commerce" and "to declare war" or to act as "Commander in Chief" must, therefore, if they are to be powers that include control over their subject matters and not mere nominal investitures of ceremonial attributes, include the power to shape the policy that is to control agreements made with other governments with respect to such subject matters. *Id.* at 452.

¹⁵ 1 Stat. 236 (1792). The constitutionality of this procedure was upheld by Solicitor General Taft in 1890. See 19 OPS. ATTY. GEN 520 (1890).

¹⁶ For a discussion of constitutional development through usage see McDougal & Lans, *supra* note 10, at 442-60. Corwin says of this usage:

The truth seems to be that the critics of executive agreement who raise the cry of "evasion" rest their case in the last analysis on the idea, never clearly expressed, that all constitutional development—by which they generally mean any departure from their own conception of what the Constitution means—ought to be by formal amendment, and that there is something essentially dishonest about constitutional changes which are brought about by practice and usage, at least as soon as such changes have reached the stage where people become generally conscious of them. I should be disposed to contend, to the

very contrary, that the most beneficial type of constitutional change is that which issues gradually from, and so has been thoroughly tested by, successful practice. E. CORWIN, *supra* note 10, at 41.

¹³ McDougal & Lans, *supra* note 10, at 474-75.

¹⁴ These figures are based on a Department of State estimate discussed by Professor Rubl J. Bartlett in testimony before the Senate Committee on Foreign Relations. See HEARINGS, *supra* note 9, at 14, 16.

¹⁵ See Addendum to the Compilation of January 10, 1969 Entitled "International Agreements Other Than Treaties 1946-1968 Classified According to the Legal Authority on the Basis of Which They Were Made or Became Effective" to Cover the Period to April 1972. (Office of the Legal Adviser, Department of State), at 39.

¹⁶ 1 U.S.C. § 112a (1950).

The Secretary of State shall cause to be compiled, edited, indexed and published, beginning as of January 1, 1950, a compilation entitled "United States Treaties and Other International Agreements," which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other formality has been executed, during each calendar year. . . . *Id.*

¹⁷ 301 U.S. 324 (1937).

¹⁸ 315 U.S. 203 (1942).

¹⁹ See, e.g., *Altman & Co. v. United States*, 224 U.S. 583 (1912); *Star-Kist Foods, Inc. v. United States*, 169 Fed. Supp. 268 (Customs Ct. 1st Div. 1958), and cases discussed in *Star-Kist* at 278-80.

²⁰ E. CORWIN, *supra* note 10, at 40. Similarly, Professor McDougal writes:

No one today seriously contends, when the question is squarely put and answered, that the treaty-making procedure is the exclusive mode by which the federal government can under the Constitution make international agreements.

McDougal & Lans, *supra* note 10, at 448.

²¹ This test seems implicit in Borchard, *supra* note 10. Sometimes it is said that this distinction stems from an international distinction between "public treaties" and "agreements" set out in the writings of Emmerich de Vattel and known to the framers. For a critical appraisal of this theory see McDougal & Lans, *supra* note 10, at 460-75.

²² Wright, *supra* note 10, at 343.

²³ See Levitan, *supra* note 10, and International Agreements Other Than Treaties 1946-1968: A List With Citations of Their Legal Bases (Office of the Legal Adviser, Department of State 1969).

²⁴ Wright, *supra* note 10, at 349.

²⁵ W. McCURE, *supra* note 10, at 363.

²⁶ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

²⁷ *Id.* at 318.

²⁸ This test seems to be the one adapted by, among others, Corwin and McDougal and Lans. See E. CORWIN, *supra* note 10, at 44; McDougal & Lans, *supra* note 10, at 475-504.

²⁹ The Department of State Circular 175 provides with respect to the "Exercise of the Executive Agreement-making Power:"

Executive agreements are not used when the subject matter is of such a nature that it should be covered by a treaty. The executive agreement form is used only for agreements which fall into one or more of the following categories:

a. Agreements which are made pursuant to or in accordance with existing legislation or a treaty;

b. Agreements which are made subject to congressional approval or implementation; or

c. Agreements which are made under and in accordance with the President's constitutional power.

³⁰ See McDougal & Lans, *supra* note 10, at 433-35.

³¹ For a similar differentiation see McDougal & Lans, *supra* note 10, at 433-35.

³² 252 U.S. 416 (1920).

³³ Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PENN. L. REV. 903 (1959). The quote is from the scope note.

³⁴ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Star-Kist Foods, Inc. v. United States*, 169 Fed. Supp. 268 (Customs Ct. 1st Div. 1958).

One commentator interprets the Curtiss-Wright decision as withdrawing "virtually all constitutional limitation upon the scope of congressional delegation of power to the President to act in the area of international relations." Jones, *The President, Congress and Foreign Relations*, 29 CALIF. L. REV. 565, 575 (1941).

³⁵ See Addendum, *supra* note 19, at 39.

³⁶ See McDougal & Lans, *supra* note 10, at 433; but see Borchard, *supra* note 10.

Senator Fulbright seems to support the authority of Congress to approve executive agreements:

I submit that an undertaking approved by a majority of the House of Representatives and of the Senate is just as solemn as action by two-thirds of the Senate . . . such action by both houses is more binding, has greater validity, greater permanency and consistency for the future than has a policy imposed by the power of obstruction, possessed by thirty-four [sic] Senators who, in any given instance, probably will represent a very small fraction of our total population . . . the most "binding sanction" would be that procedure which more accurately than any other translates into definite action the will of the greatest number of our citizens. This procedure is, I submit, a joint resolution approved by not less than a majority of both houses of the Congress.

N.Y. Herald-Tribune, Nov. 3, 1943, quoted in E. CORWIN, *supra* note 10, at 49-50.

³⁷ See International Agreements, *supra* note 27, at 261-73.

³⁸ See Addendum, *supra* note 19, at 39. Presumably this figure does not include informal agreements concluded in the day-to-day operation of the Executive branch and not officially reported in *Treaties and Other International Agreements*.

³⁹ See, e.g., "Spanish Base Agreement," HEARING BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS, 91st CONG. 2d SESS. (1970); "United States Security Agreements and

Commitments Abroad: Spain and Portugal," HEARINGS BEFORE THE SUBCOMMITTEE ON UNITED STATES SECURITY AGREEMENTS AND COMMITMENTS ABROAD OF THE SENATE COMMITTEE ON FOREIGN RELATIONS, 91st CONG. 2d SESS. (1969-70).

⁴¹ See, e.g., "Agreements with Portugal and Bahrain," REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS TO ACCOMPANY S. RES. 214, 92d CONG. 2d SESS. (Feb. 17, 1972).

⁴² "Security Agreements and Commitments Abroad," REPORT TO THE SENATE COMMITTEE ON FOREIGN RELATIONS BY THE SUBCOMMITTEE ON SECURITY AGREEMENTS AND COMMITMENTS ABROAD, 91st CONG. 2d SESS. (1970), at 28.

⁴³ See especially S 3475 introduced by Senator Ervin on April 11, 118 CONG. REC. S 5786-87 (April 11, 1972).

⁴⁴ See the agreements collected in 48 INT'L LAW DOCUMENTS 1952-53 121-43 (Naval War College 1954).

⁴⁵ 39 OPS. ATTY. GEN. 484, 486 (Aug. 27, 1940).

⁴⁶ See, e.g., BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES, 82d CONG. 1st SESS. (Comm. Print 1951), at 22-24; and 1970 REVISION, 91st CONG. 2d SESS. 21-23 (Comm. Print 1970).

Senator Fulbright has taken the position that the President has authority, even in peace time, to station the armed forces abroad:

One important issue has been quite clearly defined. That issue is whether the President should seek the advice of Congress on the question of sending troops to Europe now, or whether his discretion should be subject to the consent of Congress. Apparently the President is agreeable to the idea that it is proper for Congress to give him its advice about this question, leaving to him the full responsibility for making the final decision. He is not willing, however, to accept the principle that the consent of the Congress is necessary to validate his decision. In other words, he does not agree that his decision in this matter must be subject to the approval of Congress.

Personally, I agree with the position of the President. I do not agree with the proposal of the minority leader. The Congress has the right and power to raise the Armed Forces, but the President has the responsibility for the command of those forces. If in the exercise of his best judgment the defense of this country requires the sending of troops to Europe, he has the power and the duty to do so. Congress, of course, can refuse to appropriate the money for the troops but that is a decision for which Congress must take the responsibility. In the long run decisions on military strategy are best left to the executive. That is the plain intent of our constitutional system.

97 CONG. REC. 520-21 (1951).

⁵⁰ McDougal & Lans, *supra* note 10, at 574. See also McDougal & Lans, *supra* note 10, at 599, 610. Wallace McClure writes:

The President can do by executive agreement anything that he can do by treaty, provided Congress by law cooperates. And there is a very wide field of action in which the cooperation of Congress is not necessary; indeed, where Congress possess no constitutional authority to dissent.

W. MCCLURE, *supra* note 10, at 363. (emphasis added).

⁵¹ 272 U.S. 52 (1926).

⁵² See the authorities cited in J. N. Moore, "Statement Before the House Subcommittee on National Security Policy," in HEARINGS, *supra* note 7, at 124, 132-33.

⁵³ See McDougal & Lans, *supra* note 10, at 610-11.

⁵⁴ See, e.g., McDougal & Lans, *supra* note 10, at 610.

⁵⁵ See, e.g., the opinion of Mr. Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*:

[T]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

299 U.S. 304, 319 (1936). See also McDougal & Lans, *supra* note 10, at 432, 442.

⁵⁶ III W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1567 (2d ed. 1929).

⁵⁷ See the testimony of Professor Alexander M. Bickel before the Senate Committee on Foreign Relations on S 596, HEARINGS, *supra* note 9, at 27-28.

⁵⁸ The Bricker Amendment, in its principal form, was a constitutional amendment.

⁵⁹ See generally on the role of Congress in the conduct of foreign affairs D. CHEEVER & H. HAVILAND, JR., AMERICAN FOREIGN POLICY AND THE SEPARATION OF POWERS (1952); H. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1950); L. ROGERS, THE AMERICAN SENATE (1926); J. STENNIS & J. FULBRIGHT, THE ROLE OF CONGRESS IN FOREIGN POLICY (1971); F. WILCOX, CONGRESS, THE EXECUTIVE, AND FOREIGN POLICY (1971); Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922).

⁶⁰ For the general principle see the *Steel Seizure Case*, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

⁶¹ J. B. Moore, *supra* note 10, at 389-90.

⁶² See *United States v. Guy W. Capps, Inc.*, 204 F. 2d 655 (4th Cir. 1953). The agreement in this case was clearly not within exclusive presidential authority.

⁶³ See 118 CONG. REC. S 5309-15 (April 4, 1972).

⁶⁴ See, e.g., "Agreements with Portugal and Bahrain," *supra* note 44, 118 CONG. REC. S 5309-15 (April 4, 1972).

⁶⁵ The President might also submit such agreements to Congress for approval by joint resolution. Professor Lindsay Rogers writes:

[I]t seems to me that the sensible—indeed the only practicable—procedure is to put the treaty-making authority on the shelf and for the President to enter into international undertakings through executive agreements discussed in advance, so far as is possible, with the House and Senate committees and ratified by joint resolutions of Congress. For this there are many precedents, which have been much discussed.

L. ROGERS, *supra* note 13, at 23.

⁶⁶ D. ACHESON, A CITIZEN LOOKS AT CONGRESS 56 (1957).

⁶⁷ As a step to generally strengthen the role of Congress in foreign affairs, the suggestion of a Joint Executive-Legislative Committee on National Security Affairs has much to commend it. See F. WILCOX, *supra* note 59, at 157-59.

Senator ERVIN. I think it would be wonderful if you could get the cooperation of Congress and the Executive in this field and many other fields. Your conclusion is that the best way to share the power is to have such cooperation. But unfortunately the legislative branch doesn't think it gets very much cooperation from the President. It has had several almost unnecessary confrontations. Last week we had two, not in the field of foreign policy, but on the question of legislative privilege under the speech or debate clause. The President took the position that the Executive had a right to summon before a grand jury the aides of Congressmen and Senators, and expose their action and let it be judged by that grand jury in the presence of the country. At the same time we had the position taken by the executive department that anybody who was a presidential aide was immune to testifying at all before a congressional committee even when that congressional committee wanted to question the assistant about transactions he had had with third persons and with the Department of Justice, whose officials had already testified to those transactions.

As you state, these conflicts between the Executive and the legislative branches of the Government very much heighten tensions in the foreign policy field in critical times where the emotions of everybody have been aroused as they have with respect to the war in South Vietnam.

Of course, Congress has the power of the purse, as you suggest. But the power of the purse can hardly ever be invoked until after the horse has been stolen, and it is not much use locking the stable after the horse is gone.

The fact is that so many things are presented to Congress as accomplished agreements. The President goes down to South America, makes a public speech and says that we will give them so many hundreds of millions of dollars of foreign aid. I think Congress has come to the conclusion that it is imperative to do something. Peaceful persuasion has not resulted in very much cooperation from the Executive.

In recent days it has been particularly bad. I hate to say that, because I am a cooperative man myself. I believe that cooperation is the best way to make things work.

Can Congress frame any law in this respect that would be constitutional?

Professor MOORE. Senator, I am sure that there are some laws that could be framed that might be constitutional. Certainly Congress, for example, could deal with a specific executive agreement that fell within the unquestioned authority of the Congress and say, "We are going to terminate that executive agreement." Congress may have authority—and this gets more difficult in an area that no one quite knows whether it is exclusive or shared—to deal with the base agreements. I certainly think that the kind of broad bill dealing with executive agreements in general is clearly unconstitutional in this case, S. 3475, and is unwise.

I would share all of the concerns that you express. And I think everyone must be concerned at this point about how we can increase the role of Congress in foreign affairs and to end the spirit of con-

frontation that I think does prevail at this present time. Partly it results from, we are simply having a major national debate at this point and clarifying those lines. I think it is most far reaching, and I suspect in many ways we are going to have more answers when it is completed than has taken place before in the history of the Nation.

During that debate it does seem to me, however, that there are a number of things that we might do more specifically. I strongly support the feeling behind the bill in terms of increasing the information flow of the Congress, of the executive agreements entered into by the nation. And I would certainly support a set of informal procedures which would try to get at that problem. And I think that there is no reason we can't. That should be an eminently solvable kind of problem.

I think a second thing we ought to do is to avoid any kind of legislation which is overly rigid or which is going to check the Executive, or for his part, in terms of responding to Congress, in terms that are too broad. And I think this legislation does do that.

Senator ERVIN. Can you think of any field outside of the fields covered by the recognition power and by the powers of the Commander in Chief in which the President has the power to make executive agreements without the consent of Congress?

Professor MOORE. There are two principal problems. I would like to keep separate the question of whether the President would have authority to conclude executive agreements if Congress has not acted, and the question of whether a later congressional enactment would take precedence over a prior Presidential agreement. I think the line would be drawn in different places for different kinds of Presidential powers.

I am quite sure that the core power of the conduct of hostilities itself is one that will be exclusively the Presidential at one end of this spectrum. On the other hand, I suppose something that involves regulation of the Post Office is clearly congressional at the other end of the spectrum. In between there are some areas that are rather shadowy. I think one of those areas is really the principal concern of Congress right now. I don't think it is executive agreements in general. They have not been abused. Fewer than 1 percent are reached on solely Presidential authority. I think what you were really concerned about is the scope of the commander in chief's power in terms of the stationing of the armed forces abroad. And for my part, we will simply have to recognize that this is an issue in our constitutional history that is somewhat fuzzy. There is at least one constitutional scholar who has taken the position that that would be exclusively presidential and that Congress could not legislate in an area of, let's say, removing those bases or restricting the President from the authority to station troops abroad in times of peace. I find that a close case. And certainly it is the kind of situation that might precipitate an unfortunate kind of constitutional debate or confrontation.

Senator ERVIN. I note with interest that your position, which I think is valid, that some of the fears which engendered such a strong support for the Bricker amendment have been dissipated with the

subsequent holdings to the effect that while the treaty power enables Congress to expand its legislative activities within the field of that reserved to the States by the 10th amendment, and to the effect that the treaty power is subordinate to the Constitution and that specific provisions of the Constitution cannot be altered under the guise of the treaty power. I think these holdings are strong reassurance to those who may have been tempted to favor the Bricker amendment.

Of course, as I understand it, we have a rather unique provision in our Constitution in that treaties become the supreme law of the land without any further activity on the part of the legislative branch of the Government. I am not an expert in this field, but my study leads me to believe that with the possible exception of France, most countries do not have any such rule of law.

Professor MOORE. That is certainly correct. I think we are quite fortunate in having that rule. It does not require us to go back in every area and have domestic implementing legislation as would be necessary in Great Britain, for example. I think it is also important to point out the difference between the issues involved in the present set of hearings and those involved in the Bricker hearings. There the issues did go to the States' rights question, they did go to the question of whether the treaty power was broader than the foreign relations power, and whether the treaty power could override other provisions of the Constitution. And to all of those things, it seems to me, we know the answers more clearly since the time of the Bricker debate, and we are in general happy with those answers. That is not the problem. There really is one of where do we draw the line, preserving a strong congressional role and a strong Presidential role, really, in Presidential agreements, and what kind of authority does Congress have in dealing with Presidential agreements. I don't think that we should have a broad based attack on executive agreements at this point. That was part 3 of the old Bricker amendment. And I don't really think that that is the concern of Congress when I go through the Symington subcommittee report, for example, and others. I think the principal concern really is the finding in some context the scope of the Commander-in-Chief power.

Senator ERVIN. If I construe your views right, there is virtually nothing in the Constitution that you can look to to settle the problem of whether foreign agreements should be embodied in a treaty or in an executive agreement.

Professor MOORE. That is correct, if executive agreement includes the executive-congressional forms as well as the presidential form. I think they are for domestic constitutional purposes essentially interchangeable. The criteria that one can look to decide which form to use, I think, are what kind of preference does Congress have in this area. The President ultimately must work with Congress, he depends on them for appropriations and for many other things that you are more aware of even than I, sir. And I think it is important that he go to Congress on these issues. But beyond that there is nothing in the Constitution he can look to that is going to give us an answer one way or the other.

Another criteria that we go to, it seems to me, again not in the text of the Constitution, is the kind of international effect. This is

very important. And it is one reason that I would oppose the Senate resolution on the Bahrain agreement in the past and the pending legislation in the case introduced on the Bahrain agreement. I don't think internationally the proper form to use on those base agreements is the treaty. I think we would be signalling the kind of long lasting—the kind of major political commitment or multilateral kind of format that we normally signal when we use the treaty form.

And it is one of the things that disturbs me about that legislation.

Congress is concerned. They want to participate. They say, what can we do in those cases. And I think they reach out and say, the answer is, it should be submitted to the Senate as a treaty. And I don't think that is the answer. The answer, if any, on this certainly lies in greater consultation ahead of time with the Executive conceivably in holding hearings under the appropriations power, and possibly for the executive to experiment with presenting some of these agreements in the area of greatest concern to Congress as joint resolutions.

Senator ERVIN. I think that would be wise on the part of the President. But I am bound to confess that he doesn't show much inclination to do so. About the only way Congress originally found out about some of these agreements about bases and things was by reading the newspaper, which seems an awfully poor way to run a governmental railroad to me.

Professor MOORE. Yes, that is shades of Dean Acheson, I believe. And I would agree with that, that we need very much to have an information flow that informs Congress of all of the major kinds of international agreements. And by major I don't mean carving out something that Congress is interested in, I mean those that Congress is concerned with there should at least be in information flow to Congress.

As to the form that that should take, I am rather close to the Case bill, I am not far away from it, but I personally think that there may be some case to be made there for saying that the informal procedures should be preferable to the informal arrangement with the Case bill.

Senator ERVIN. You have a very fine paper that manifests much erudition and research. Since you didn't read it verbatim I would like to have the whole thing printed in the record in its entirety, including the footnotes that you give for the authorities you cite.

Counsel.

Professor MILLER. Thank you, Senator.

Professor Moore and I had the pleasure of being students of the same international law authority, Professor McDougall. And it is amazing to me that two people who studied under the same law professor could be so much in disagreement.

I would like to ask a few questions.

Senator ERVIN. You may state what I say on many occasions, that all people don't share my sound views on all matters.

Professor MOORE. At least you don't feel that it is profoundly erroneous.

I am sorry to hear that.

Professor MILLER. I think Professor Moore would agree at the outset that there are few, if any, definitive Supreme Court opinions setting out the powers of Congress and the Presidential powers in these areas. The definitive Supreme Court cases go mainly to the nature of executive agreements on State legislatures, at least the recent ones. Certainly the *Curtiss-Wright* case could not and should not be read other than as determining whether or not executive power in foreign affairs might not be valid.

Is it your position that the long-continued practice of the State Department or the Executive in some way validates present day practice and makes it a principle of law?

Professor MOORE. I am going to respond to each of those in turn, if I might, Professor Miller.

First, as of now, the lack of cases in the area is not simply an attribute of the executive agreement power, but is one that characterizes the whole question of dividing the foreign relations power between Congress and the President, largely because the court has said in most of those cases that it is a political question, that the issue simply hasn't come before the court.

However, the lack of cases, it seems to me, specifically on point does not undermine any of the strength of the assertion which I make in this area that this bill is unconstitutional in asserting the authority of the President to make executive agreements. And the reason for that, if I might plead it for a moment, is that the executive agreement power comes from the specific grants of authority in the Constitution to the President and to the Congress and whatever inherent powers they both have to carry out those powers. So that it really is incident to those specific grants of authority. And on those grants of authority we do know, it seems to me, there is almost unanimous agreement that there is a complete core area of the commander in chief power which is not subject to congressional legislation and which is exclusive to the President. And most commentators say that negotiations of international agreements as well as recognition also fall into that category.

Professor MILLER. Let's take this commander in chief power and the conduct of hostilities. There is a constitutional provision which says that Congress shall declare war, which implies that Congress has an interest, at least, or as implied power. Article 1, section 8, clause 18, says that Congress has the powers necessary and proper to carry out those foregoing powers and any other powers in any other department of government. Even if you argue that the President has inherent powers, which I take it you do, does not Congress have power under the necessary and proper clause?

Professor MOORE. I think the necessary and proper clause goes to carrying out whatever powers he has in the area, which would certainly include, I suppose, regulation dealing with declarations of war and involvement in major hostilities—

Professor MILLER. But if you read the entire section, Professor Moore, you will find this statement:

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers—that is the declaration of war thing—and all other powers vested by this Constitution in the Government of the United States or in any department and officer thereof.

I take it that the President is an officer of the Government. Would you agree with that?

Professor MOORE. Yes. I am familiar with——

Professor MILLER. Does not the Congress have, then, power under this clause to make laws concerning the way it is carried out?

Professor MOORE. I think not, Professor Miller. I think to read it that way is to say that there is no separation of powers principle, it writes it out and says that Congress can legislate in this area, that there is no exclusive area. I simply don't read that clause that way.

Professor MILLER. Give me a constitutional provision which says to the contrary, which gives the President exclusive powers.

Professor MOORE. I think really that we shouldn't read the Constitution the way we would read a municipal traffic ordinance, in terms of placing the language of the Constitution——

Professor MILLER. We should read it for its plain meaning, should we not, Professor Moore?

Professor MOORE. Certainly we are concerned with its meaning. But we are also concerned with other clauses dealing with the intent of the framers. And nothing could be clearer from the record of the Constitutional Convention—and the Federalist papers, by the way—that at least when it came to the question of the regulation of the power of the President as Commander-in-Chief they did not wish to repeat the disastrous experience under the Articles of Confederation, and the conduct of hostilities was to be placed in Presidential hands.

Second, let me go on and answer the second half of your question I never got to. And that is, what is the effect of the Constitutional practice? In this area the starting point is, we have a kind of inherent ambiguity built into the Constitution. We have the treaty procedure on one hand. On the other hand, we have a series of specific grants of authority to both Congress and the President on the other side, which reasonably interpreted carry along the power to make international agreements. That was so interpreted by the first Congress of the United States.

I think the congressional practice supports that. And the Supreme Court cases have borne that out. And I don't feel that it is open to question today in the light of the cases and practice that executive agreements are somehow a subversion of the Constitution.

Professor MILLER. I didn't say that. I am asking you; as a general proposition, Professor Moore, as to whether or not you think a long-continued practice can create law.

Professor MOORE. It is certainly a practice in this area—yes, it can create law. In this area it is not a question. I would like to point out, of going against some specific provision of the Constitution by practice. Practice is, simply clarified, a point that was never clear in terms of the language of the Constitution, or the intent of the framers in going through the convention, what kind of alternative procedures were available for reaching international agreements. In this area it is clarified that both the Presidential agreements and the executive-congressional agreements are constitutional modalities of concluding international agreements.

Professor MILLER. You have made an effective statement, even if I don't agree with all of it.

I would like to ask you a specific question, and pick out, if I might—and I hope I am not out of context because it is an important statement—on page 12 of your statement: “The North Atlantic Treaty aside, the base agreement with Portugal as well as those with Spain and Bahrain which are not within the NATO area, would seem to be within the independent authority of the President as Commander-in-Chief.”

What is the authority for that statement?

Professor MOORE. Well, I go on in the next several pages to discuss the constitutional practice. There are no cases squarely on point, as you well know, Professor Miller. But I do think the constitutional practice there supports that. And to briefly review that practice, it is that there is both a body of authority in terms of the agreement power and in terms of the stationing the Armed Forces abroad in times of peace, the writers of the Constitution as well as the practices by Presidents supported that. We can cite, for example, the practice by President Roosevelt in sending U.S. forces to Greenland, and to Iceland immediately before World War II without constitutional participation in the process at that point.

Professor MILLER. And it is your position that since President Roosevelt did that, it validates what President Nixon is doing today, is that it?

Professor MOORE. It never ipso facto validates something because the practice takes place. It is always possible that the practice exceeded the limits of the Constitution.

Professor MILLER. It is possible that both were wrong, is it not?

Professor MOORE. It is always possible that is the case. But in an area when one is trying to interpret the Constitution, they certainly look to practice as a basis for that interpretation. And there is authority in the background of the United States in terms of what Presidents have done as well as what the writers have written on it, that it is perfectly constitutional. In fact, Senator Fulbright defended—I have a footnote in the statement—on the floor of the U.S. Senate in very strong terms the power of the President to commit the Armed Forces in peacetime to station troops abroad in Europe. A debate arose at an earlier time in our history. So it seems to me that there is very significant authority for the position that the President has constitutional authority in that area.

Professor MILLER. I wouldn't, of course, presume to speak for Senator Fulbright, but I am inclined to believe that he might think differently today, for whatever reason. Certainly his testimony yesterday would not lead me to think that he believes the same thing today.

Let's take this point of the Portugal agreement. As I understand your testimony, you believe that the State Department or Pentagon should at least tell Congress, that we have entered into an agreement. However, you oppose Senator Case's bill that might cut off funds for that. Now, just what remedy does Congress have? What have you left for Congress? Have you left them nothing?

Professor MOORE. I think in this area it is not necessary to get to a confrontation in terms of increasing the information flow. I think Congress should pick up the suggestion made by the legal advisor in testifying before the Senate Foreign Relations Committee on the

Case bill. And that is that the administration would be very pleased to work out informal procedures with Congress to inform them of all the major international agreements entered into by the United States. I think that should be done. It is intolerable not to have that kind of information flow. And I would recommend both to the Executive that he initiate that, and if the Executive does not, that the Congress try to do it. But I don't think the way to force this is to pick out two agreements which should not be treaties in terms of the international effect that we are trying to achieve by those agreements, and say they must be submitted as treaties or we will cut off appropriations. It is far better to simply hold hearings on the appropriations and deal directly with the appropriations questions for those bases.

Professor MILLER. In other words, you would advocate a remedy whereby Congress would cut off the funds if they thought that desirable?

Professor MOORE. That is certainly one of the remedies that the Congress has. I don't read the background context of these base agreements as requiring it.

Professor MILLER. Do you think it would be a desirable alternative to the S. 3475?

Professor MOORE. Yes; I certainly do, I think it is far preferable to S. 3475 that is going to set up procedures that you will have to live with in all of these agreements in the future. And I think they are undesirable.

Professor MILLER. Predicated, of course, on the fact that Congress is told about them in the first place.

Professor MOORE. I hope we can get over that hurdle. I am most sympathetic with that. And since both the administration and the Congress has said that their position is the same on that, I see no reason why we can't get over it.

Professor MILLER. We heard testimony yesterday that there might be truckloads of documents coming up to the Congress. How many of these agreements would it be necessary for Congress to screen?

Professor MOORE. This goes really to the workability point of the bill in terms of, will there be a deluge of trivia descended on Congress, and can it handle that, and can the Executive handle it. Your bill uses a different test on this than does the earlier legislation setting up a different series. Your bill uses the test of any internationally binding commitment or agreement. The earlier legislation which set up the reporting mechanism for the kind of agreements which are printed basically uses the test of any such agreement or commitment involving some kind of formality. And I suppose an exchange of notes is a formality. And I suppose certainly anything that is a signature by an officer of the U.S. Government at the bottom of one of those agreements pursuant to article 3 of NATO is a formality, and in fact those have been reported in the official series. If we have the language as broadly as you have it here, it is almost impossible—I don't know how the judgments would be made as to what kinds of things in an oral conversation are going to be binding on the United States and what kind are not, I don't quite know.

Senator ERVIN. If I may interrupt at that point, the States have a statute of frauds that requires agreements about real estate to be in

writing. Couldn't Congress very well pass a law and say that no executive agreement will be binding unless it is reduced to writing?

Professor MOORE. That is an interesting point. I would like to reflect on it, Mr. Chairman. One difficulty I have with it is certainly in terms of its international legal effect. The act of Congress would not change the international legal rule that oral agreements can be perfectly binding.

Professor MILLER. Professor Moore, it seems to me that if there is going to be a deluge of trivia, possibly, from the Executive, there will be no place where anybody knows what is going on, isn't that true?

Professor MOORE. I am sure that there are significant problems within the executive branch, and that circular 175 was aimed at trying to help out in some of those problems. And I think the problem should be addressed within the executive branch as well as within the Executive and the Congress. I think the answer in this is really not some kind of procedure that says, Congress wants to see all of these agreements that are concluded. You have the most of them anyway that come to your library rather quickly in the form of agreements that are printed in treaties and other international agreements series. So, that what you are really talking about is the way of informing you systematically of the kind of agreements that you are going to have an interest in, and that involves significant policy questions. And you are talking about the secret agreements.

Professor MILLER. How does Congress know they are going to be interested unless they can see them all?

Professor MOORE. I think that is largely a question of the executive branch simply operating in complete good faith and candor with Congress in terms of saying, we will let you know as broadly as possible, let us know in general the kind of things you are interested in and we will let you know. You are certainly interested in base agreements today. From what I can say the heart of the interest is stationing troops abroad. If that is your interest, then we would like to have all such agreements, we would like to know whether they are creating commitments, and we would like to know what risk there is of war in having those troops there. And I think that is the kind of thing Congress can very properly do.

I am a little troubled by the singling out of these base agreements in general, and suggesting really we are running a risk, a significant risk of involvement in major hostilities because we have these disagreements. I think it is a myth. There is a risk, there is always a risk. President Roosevelt took a very substantial risk with them immediately before World War II. But Vietnam did not result in that kind of commitment of American troops by virtue of some kind of base, rather we had bases in Vietnam because we had the SEATO Treaty and other kinds of commitments, the commitments which Congress had addressed.

So, I think you are really at this point perhaps over concerned with these particular military base agreements.

Professor MILLER. I think there are other areas as well, Professor Moore, but these seem to be the focal points at the moment.

We had heard testimony yesterday that the President would have power under his Commander in Chief powers to commit 50,000 troops anywhere in the world if he wished to do that.

Would you care to comment on that?

Professor MOORE. Yes. I testified before the Senate Foreign Relations Committee on this, and I would be pleased to.

Although I oppose the War Powers bill and think it an unwise piece of legislation, nevertheless I think that is an overly broad statement of what the Commander-in-Chief can do. And it is one of the things that has led us, I am afraid, down the road to the War Powers legislation. It seems to me very clear that when it comes to major sustaining hostilities abroad, Congress must participate in the decisionmaking process over that kind of involvement in hostilities. That is surely a minimum statement of what the power to declare war meant. I do think there is some low level kind of involvement in hostilities—humanitarian intervention, response to Pueblo [sic] for example—that the President has the authority as Commander-in-Chief to respond to, which are below the threshold of war in a constitutional sense. And that is one of the difficulties that I have with the War Powers bill that recently passed the Senate.

Professor MILLER. Perhaps you won't agree with this, but I hope you will. I know of no cases which would definitely say that Congress does not have the power to pass such a statute as this. Do you know of any?

Professor MOORE. I think the Myers case is very analogous in saying that in areas exclusively entrusted to the President, such as the removal of Federal officers, even though the Constitution, Professor Miller, didn't say that, Congress could not intervene and pass a statute stating that the President could not do so. So, we do have clear Supreme Court authority for the proposition that there are some exclusive areas of Presidential authority.

Professor MILLER. But no square authority on whether Congress has the power to pass this bill?

Professor MOORE. That is correct, as in most other areas of the Federal-congressional-Executive relation.

Professor MILLER. Thank you, sir.

Senator ERVIN. I am intrigued by Professor Miller's question about the necessary and proper clause. It says that Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the powers vested by this Constitution in the Government of the United States or any department or officer thereof. It would seem to me that in such a case, Congress could pass a law and say that the President couldn't make any oral executive agreement, that he would have to reduce them to writing, and having reduced them to writing, he would have to file them with Congress.

Professor MOORE. I must respectfully disagree, Mr. Chairman. And there are two points I would like to make. One, if you interpreted the necessary and proper clause that broadly, there would be no principle of separation of powers. The purpose for this committee, it seems to me, would be very substantial. Congress could do anything to legislatively restrict the President.

Secondly, I think there is authority from the Supreme Court that would restrict that kind of interpretation. And I think that authority as *Myers v. The United States*, because if that line of reasoning were correct, then the *Myers* case was wrong, and cannot have been decided the way it was by the Supreme Court.

Senator ERVIN. I think the *Myers* case involves a substantive power. I suggested that it involved a mere procedural power. Of course, the courts are just as independent of the Congress as the President is, if not more so. And yet, the Congress could pass laws establishing procedures by which the courts exercise their jurisdiction.

Professor MOORE. I find always the notion of substance and procedure a slippery one to get a handle on. But I am not sure that I can do this, as any more procedural than the *Myers* case. It seems to me that it may well go to the heart of the kind of freedom that the President has under the Commander-in-Chief power. Could you pass a law, for example, saying that any order to any commander on the battlefield must be issued in writing by the President? I am intrigued by that. And if you can't do that, how can you do it in an executive agreement?

Senator ERVIN. I wouldn't quite go that far. I do think the President has the powers as Commander-in-Chief. I agree with you thoroughly on this as regards direct hostilities. I voted against the War Powers bill because of this conviction. I don't think he has to share his powers as Commander-in-Chief with 100 Senators and 435 Congressmen. However I doubt very seriously that the President has the constitutional power to make an oral executive agreement with another nation and then conceal from the Congress the fact that any such agreement has ever been made.

Professor MOORE. The motion of concealment, of course, goes against my grain as well, in terms of concealing it. He should not, it should not be concealed. We should have the complete information; and, as a matter of constitutional law, I am not sure I am in total agreement. I think there are areas in which Congress has no legislative competence, and I think at least when it comes to the area of the conduct of hostilities, it is possible that the Executive has the constitutional power not to review any of the agreements made with respect to that constitutional power to Congress. I think it would be a great mistake to do that, as a matter of constitutional law and the separation of powers.

Mr. EDMISTEN. Is it the crux of this problem that the executive branch of the Government doesn't trust Congress?

Professor MOORE. I rather think that the crux of the problem is that there is a sense of confrontation on both sides, which is unfortunate. And we know why it has resulted. It has resulted because the country is split at this point on the Vietnam war. We are concerned about the posture of the United States in terms of involvement in future wars. And it is very important that we have the kind of thorough hearings that we are having now. But I don't think that it is fair to say that the height of the problem is simply an executive problem as opposed to a congressional problem. I think it is both. I think that Congress is going too far in the War Powers bill. I think Congress may be going too far in the Case Bill. I certainly think we

are going too far in terms of suggesting that the Bahrain and the Azores Agreements must be submitted as treaties to the Senate.

Mr. EDMISTEN. In other words, you would leave everything status quo, except for informing the Congress about treaties? I do not think that a two-line description of an agreement will suffice as notice to the Congress. Do you?

Professor MOORE. Again, to carve out the agreement from the information flow point, there is room for very substantial improvement in the information flow to Congress. But the Executive has to know what Congress is interested in on that. And on this I think you ought to narrow your scope, you ought to say, it is not all executive agreement that we want under some very broadly worded bill, it is instead the executive agreement in the following areas that really do concern us, that we are concerned about in terms of major national vital issues. As to what we do specifically beyond that in terms of avoiding overly rigid legislation, that is one thing we can do. I think the information flow is another. I am rather attracted by the idea that Francis Wilcox has put out a new book. And many others have pleaded from time to time to set up some kind of Joint Executive Congressional Committee on National Security Affairs, at least a Joint Congressional Committee on National Security Affairs, to increase the communication between the Executive and Congress. I don't think we have the procedures today to increase that kind of information flow as we should. I would like to see something like that.

Mr. ABRAMSON. I get the impression from your statement, that if the Executive tomorrow were to send up a memorandum stating what forms of executive agreement are within their power, Congress would be powerless to do anything about it. And that to me would really be no separation of powers at all. I get that impression from your testimony, just to put it in that form.

Professor MOORE. I don't mean to imply that. I mean to imply instead that whatever that constitutional line is, Congress is powerless to change that line without constitutional amendment. I don't know precisely where it is. I don't think anyone knows because all the cases haven't arisen, and we haven't tested it. We know where they are in certain kinds of core areas. I do think that it would be unwise for Congress, in trying to demonstrate very broad congressional authority, to respond by legislation that doesn't, I think, get really to the heart of the congressional concern. The heart of the concern is much narrower.

Mr. ABRAMSON. I have so many questions, that I will just have to limit them to one. You mentioned in your testimony that the Congress certainly has as one of its powers enumerated the power to declare war. And then you said you thought the Executive in cases like the *Pueblo* could—I think you said because of his inherent powers or implied powers, the Executive, because of his Commander-in-Chief role, could then have forces in that area. But you say it is the role of Congress to say what is that middle ground. Who is to determine what is that middle ground? You are saying that Congress can't. You are saying that Congress that the Executive can't. And I find that a little troublesome, because that is too unpredictable. I think, from the standpoint of the public.

And I recall one statement in my constitutional law class, a long time ago, that in many cases constitutional law was public policy crystallized. And I think in many ways that would not be crystallized at all.

Professor MOORE. Let me answer both of your points on it.

First, on the *Pueblo* case, the answer as to how far the President's inherent authority as Commander-in-Chief would go really depends on what he is trying to do. It is unquestionable—and this is what I was trying to get at—that he has the authority to defend against an attack, an ongoing attack, on American warships that are on the high seas. It seems to me that that is not subject basically to challenge nor is it challenged by the War Powers bill, nor is there really any dispute about it. If 3 years after that the *Pueblo* was used as an excuse to invade North Korea, that would trouble me in terms of—it would not only trouble me, but that would be a violation of the President's authority as Commander-in-Chief, it goes beyond that.

In terms of how we work out these issues, the issues will not be worked out by specific legislation. They are constitutional issues. And the President is powerless to change the constitutional line, as is Congress, in the absence of a validly adopted constitutional amendment. In practice, the line is going to be drawn by the kind of hearings that we are holding today, that the Senate Foreign Relations Committee has held, and that occurred at the time of the exchange between Hamilton and Madison. It is going to be worked out in the day-to-day operations of the executive branch in its relations with Congress. And hopefully it is going to be determined on the basis of some kind of functional test of how we ought to draw the line.

And there is something I would like to recommend on that, because there seemed to me to be some criteria that we can get a grip on. The starting point ought to be, we should prefer the sharing authority. And that means the widest possible participation in decisions by the Executive and Congress acting together. We ought to draw the line under that when we find and only when we find, a good functional reason for doing so. There are some. One of those is negotiating responsiveness. And one of those is secrecy, and one of those is the need to act quickly and decisively in emergencies. Those are the things, it seems to me, the kind of areas that we ought not to tie the Executive's hands in. We need that kind of authority from the Executive; and we should try to draw the line issue by issue in reference to what those functional points might be.

Senator ERVIN. I take much consolation from the fact that you do emphasize that the powers, both of the President and the Congress in respect to foreign affairs, ought to be found in the Constitution instead of in this concept of Justice Sutherland set out in the *Curtiss-Wright* case.

Professor MOORE. Right, Senator.

I think one of the other points that we need to make is that the issue we are talking about is not determined by the *Curtiss-Wright* case. We don't even need to discuss the *Curtiss-Wright* case because what the *Curtiss-Wright* case says is that the foreign affairs power is inherent. And I think that also is a matter of constitutional law

today, it is good law, that the Federal Government has the power in foreign affairs and not the States. But it doesn't tell us—at least I am somewhat unhappy with the reasons given in the *Curtiss-Wright* case—as to how you divide the authority that is inherent between the President and Congress. And I suspect that both get some of that inherent power from the same kind of reasons we are talking about otherwise.

Senator ERVIN. I prefer to call it implied power rather than inherent.

Professor MOORE. Yes.

Senator ERVIN. Thank you very much. You have made a very interesting contribution. Someone has said that while there is some difference of opinion, sometimes the differences of opinion strike sparks of illumination. Thank you very much.

Professor MOORE. Thank you, Mr. Chairman. It was a pleasure to come.

BIOGRAPHICAL INFORMATION—JOHN NORTON MOORE

CURRICULUM VITAE AND SELECTED RECENT PUBLICATIONS

Name and Present Position.—John Norton Moore, Professor of Law and Director of the Graduate Program, The University of Virginia School of Law; Sesquicentennial Associate of the University of Virginia Center for Advanced Studies; member of the State Department Advisory Panel in International Law.

Courses: 1970-71 Academic Year.—International Organizations and the Strategy of World Order, Principles of Property, Seminar in The International Law of Conflict Management, Seminar in Legal Education.

Place and Date of Birth.—New York, New York, June 12, 1937.

Educational Background.—B.A. in Economics 1959 Drew University; LL.B. (J.D.) with distinction 1962 Duke Law School; LL.M. 1965 The University of Illinois; Fellow, The University of California (Berkeley) International; Legal Studies Program 1963; Special Fellow of the National Institute of Health, The Yale Law, School 1965-66.

Professional Experience.—Teaching Associate 1962-63, The University of Illinois School of Law; Assistant Professor of Law, The University of Florida School of Law 1963-64; Assistant Dean and Assistant Professor of Law, The University of Florida School of Law 1964-65; Associate Professor of Law and Assistant Dean, The University of Florida School of Law 1965-66 (on leave at the Yale Law School); Associate Professor of Law, The University of Virginia School of Law 1966-69; Professor of Law, The University of Virginia School of Law since September 1969; Director of the Graduate Program, The University of Virginia, School of Law since September 1963; Co-Director, The Council on Legal Education Opportunity Summer Institute, The University of Virginia, 1969; Sesquicentennial Associate of the University of Virginia Center, for Advanced Studies for the 1971-72 academic year; Member of the State Department Advisory Panel in International Law since 1970; Lecturer at the Judge Advocate General's School since 1968; and Consultant in international law to the Naval War College since 1967.

Associations and Learned Societies 1970-71.—Member of The Order of the Colif; Member of The Bar of the States of Illinois, Virginia, and Florida; Member of the Executive Council and the Executive Committee of the American Society of International Law; Member of the Board of Review and Development of the American Society of International Law; Chairman, The American Society of International Law Committee on the 1971 Annual Meeting; Rapporteur of the American Society of International Law Study; Panel on the Role of International Law in Internal Conflicts, Member of the American Society of International Law Ad Hoc Committee on Governance; Member of The Executive Council of the Charlottesville Committee, of the Council on Foreign Relations; Rapporteur in the continuing conference on Environment and Society, in Transition sponsored by the American Branch of the World Academy of Arts and Sciences and the American Geographic Society; Member, The

Committee on Studies Beyond the First Degree in Law, of the Association of American Law Schools; Member, The Association of American University Professors; Member, the American Bar Association; Member, United Nations Association of the United States; Member, International Association of Environmental Lawyers, Chairman, The Committee on International Law and the Use of Force of the American Bar Association Section of International and Comparative Law; Co-Chairman, Committee on Humanitarian Protection for Victims of Armed Conflict; Member of the Board of Editors of the *American Journal of Int'l Law*, and member, Am Branch of the Int'l Law Association.

Current Law School and University Committees 1970-71 The University of Virginia.—Chairman, The Educational Policy Committee of the School of Law; Chairman, The Committee on Reduced Teaching Loads of the School of Law; Member, The Graduate Committee of the School of Law; Member, The Law Day Committee of the School of Law; Member, The President's Ad Hoc Committee on Selecting a New Dean, for the Graduate School of Business Administration; Member, The University Committee on Students; Member, the University Committee on Foreign Students; and Member, The University Committee on Scientific Computer Users.

SELECTED PUBLICATIONS AND RESEARCH IN PROGRESS

Selected recent publications

Strengthening the Congressional Role in the Use of the *Armed Forces Abroad* (Testimony before the Senate Foreign Relations Committee April 26, 1972).

The Role of Congress and the President in the Use of the Armed Forces Abroad (Testimony before the Subcommittee on National Security Policy of the House of Representatives June 25, 1970) reprinted in *Congress, The President, and the War Powers 91st Cong. 2d Sess.* (Comm. Print 1970).

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Major research in progress

Editor, *The Arab-Israeli Conflict and International Law* (Prepared for the American Society of International Law Panel on the Role of International Law in Internal Conflicts and to be published by the Princeton University Press in three volumes hardcover and a one volume abridged edition).

Editor, *Law and Civil War In The Modern World* (Prepared for the American Society of International Law in Internal Conflicts and expected to be published during late 1972)

Strengthening the Role of Law in the National Foreign Policy Process. (An article being prepared on proposals to increase the role of law in the policy planning process).

Senator ERVIN. Counsel will call the next witness.

Mr. EDMISTEN. Mr. Chairman, the next witness is Prof. Alfred H. Kelly, chairman, department of history, College of Liberal Arts, Wayne State University.

Senator ERVIN. I want to welcome you to the subcommittee and to express our deep appreciation for your willingness to come and give us the benefit of your views and observation on what I consider a very important question.

STATEMENT OF PROF ALFRED H. KELLY, CHAIRMAN, DEPARTMENT OF HISTORY, COLLEGE OF LIBERAL ARTS, WAYNE STATE UNIVERSITY

Professor KELLY. Thank you, Senator.

I am a constitutional historian, although I have taught in the Wayne Law School. My point of view is somewhat different from that of a lawyer approaching this problem. I approach the problem in terms of constitutional history. And I am looking at the development of living practice rather than in terms of arguing cases, although I have some citations.

If I may, I will read this. It isn't too long.

An analysis of the relationship between executive agreement and the treatymaking power must begin by taking into account the very substantial shift in the balance of power between the Executive and Congress which has taken place in the area of foreign policy in the last 30 years or so. The fundamental causes lying behind this shift are well known to the members of this committee, and need not be expounded at any very great length here. They begin with the fact that the destruction of the balance of power in Europe and the technological disintegration of the ocean barrier, both of which occurred between 1885 and 1945, plunged the United States after 1940 very heavily into the politics of Western Europe and finally of the entire eastern hemisphere, to the end of preventing a single power state—first Germany and then the Soviet Union—from establishing general hegemony in Western Europe, a hegemony which would have menaced the welfare, prosperity, and at last even the basic security of the United States and the Western Hemisphere generally. The result was a vast increase in the foreign policy operations of the executive branch of the Government, operations which to a considerable extent by their very nature tended to exclude the two houses of Congress from direct participation. The advent since 1945 of a bipolarized world, in which the United States became the leader of a complex series of grand alliances intended to check and balance the power of the Soviet Union strengthened substantially this tendency. Immersed as it now was in something like traditional balance of power diplomacy, the United States reacted in essentially the traditional fashion by conducting extensive, intimate and generally secret

executive—to executive negotiations in the accepted style of Talleyrand, Metternich, or Castlereach.

The very nature of this process, which originated before the flowering of constitutional democracy in the United States or anywhere else, is anticonstitutional, and antidemocratic. Within the American Government it can be described as directly at odds with the traditions of the separation of powers, checks and balances and above all constitutional supremacy. It is not that those practicing the new diplomacy were anticonstitutionalists; on the contrary, no one was engaged in a conspiracy to subvert the constitutional system. But secret diplomacy, summit negotiations, the implementation of alliance systems, the secret activities of American agents and diplomats with respect to Nicaragua, Cuba, or Greece, let alone Germany or India, all took their toll of internal constitutional processes. Even the open implementation of treaties openly arrived at in the Wilsonian fashion—for example, the decision by President Truman in 1951, for example, to station four Army divisions in the nascent Federal Republic of Germany in fulfillment of U.S. obligations under the NATO Pact—had some adverse effect upon internal constitutional processes, as the feeble “sense of the Senate” resolution on that subject adopted at the time of the so-called Great Debate attested. And even where a prior statutory base existed for the conduct of the diplomacy in question, deliberately brought into being by consultation between the Executive and the Congress, as was the case with respect to the Marshall plan, the resultant operation of the ECA led to an elaborate body of diplomatic activity on the part of the Executive in which Congress could play but little part.

The rise of collective security and the American commitment to the United Nations, ironically, also damaged internal American constitutional processes. The Truman decision to oppose by force the 1950 invasion of South Korea subverted the constitutional power of Congress to decide between war and peace, even though the President nominally did not take the United States into war and technically acted only in pursuance of a Security Council resolution. There was some considerable constitutional force in Senator Robert Taft’s embittered observation during the Great Debate that by intervening in Korea the President had “usurped power and violated the Constitution and laws of the United States,” even though few men then or now would question the integrity of motives that had caused the President to act as he did. Subsequent executive action, either in support of the United Nations, of American regional treaty obligations, or simply of American power interests—in Lebanon, the Offshore Islands, Thailand, Cuba, and Vietnam—acted further to alter the internal balance of power within the American constitutional system.

One should not fall into the simplistic interpretation that the Executive acted in all these matters without a pretense of constitutional foundation or in direct subversion of the rights of Congress. That was seldom the case, and even where the situation approached that—as in my opinion it did in the Destroyer Base Deal in 1940, where I would agree with the late E. S. Corwin’s devastating analysis of the situation—the Republic was faced with the fact of a

very great emergency touching the security of the Nation in the most fundamental way, and Congress itself was inclined to accept the Executive's solution.

On the contrary, the power of the Executive in foreign affairs since 1789 always has been very large, and in actual practice has involved an element of prerogative power, even though a reading of the Constitution, at least in orthodox legal terms, might appear to allow very little for the idea of prerogative in the operation of our constitutional system. I disagree emphatically with the contention of Professors Ruhl Barlett and Alexander Bickel, as set forth in their testimony before the Senate Committee on Foreign Relations, October 20, 1971, that the concept of executive prerogative as set forth in *United States v. Curtiss-Wright Aircraft Corp.* (1936) was constitutionally unsound and without historical validity and meaning in the operation of the American constitutional system. If the "living Constitution" means anything, the concept had in fact been very much alive since Washington's decision in 1793 to issue a proclamation of neutrality at the time of the Genet Affair. So, also, is the concept of executive privilege in foreign affairs, which took its departure with Washington's refusal to surrender to the House of Representatives the secret papers incident to the negotiation of the Jay Treaty, a refusal in which the President was sustained by a narrow and decisive vote of the House. It does not help to pretend that prerogative and executive privilege have not had a part in the living Constitution, because they have. Rather, it helps one to understand that the Executive in the past 30 years has had some substantial constitutional base for the vast additional expansion of power that has accrued to it in its attempts to deal with the contemporary diplomatic world. Presidents have not carried on a long-range conspiracy against the Constitution. But the fact remains that the damage done since 1940, to the internal balance of power within the constitutional system has been very great, and the impulse of Congress to do something about it, both in the interests of balanced constitutional government and even of the formulation of intelligent policy in the interest of national security is altogether sound.

The problem of executive agreements—and what I would insist from a constitutional point of view is the abuse thereof—is merely one phase of the larger problem outlined above. The resort of executive agreements as a means of subverting the treaty power of the Senate is in fact nothing very new; there were already notorious examples of this technique well before the First World War. Theodore Roosevelt's virtual defiance of the Senate between 1905 and 1907, with respect to the crisis of Santo Domingo, when he arranged for an American financial protectorate by executive agreement after the Senate had specifically rejected a treaty designed to accomplish that purpose, is a specific case in point. So well established by 1950 was the executive agreement as a way around the treaty power that one speaker in a Brookings Conference of that date described an executive agreement as:

Any treaty between the United States and a foreign power which the President thinks he can handle successfully without submitting it to the Senate, either because he has the partisan support to get away with such evasion or because he thinks the Senate is sufficiently ill-equipped constitutionally to deal

with such procedure that it will be helpless to do anything about the matter anyhow.

Senator ERVIN. Maybe you can call our attention to what is an executive agreement.

Mr. EDMISTEN. Who said that, Professor?

Professor KELLY. I have got it in my notes, but I can't find it at the moment. But I believe it was the late Assistant Secretary of State Leo Pazvolsky, who was an Assistant Secretary in the middle and late 1940's, and was an expert on international agreements with respect to finance.

The Bricker amendment, which languished in the Senate between 1950 and 1957, had, it will be recalled, a provision—article III—which would have confirmed the power of Congress to regulate all executive agreements between the United States and other nations and with international organizations, and which also subjected executive agreements also to the limitations of the treaty-making process, as set forth in the amendment—and presumably also in the Constitution itself. That is, an executive agreement, like a treaty, could not conflict with the provisions of the Constitution—despite the strictures of the court to the contrary in *Missouri v. Holland* (1920)—and such agreements, like treaties, would not be internally self-executing without confirmatory action by Congress. In the opinion of the present observer it is unfortunate that these provisions with respect to executive agreements were by the terms of the Bricker amendment itself entangled with the much more controversial which clause of article II of that proposal, which unquestionably called up a certain threat to the sovereignty of the United States in foreign affairs. The result was that the attempt in article III to deal with the problem of executive agreements, however clumsy it had been, as a device for subverting the treaty power was lost. But I would contend that the attempt on the part of the Congress to bring executive agreements more adequately within the aegis of the treaty power was fundamentally sound, however questionable it might have been in certain technical details, and it is unfortunate that the decline and fall of the amendment carried the article on executive agreements—or one like it—to an unwarranted demise and destruction.

The evolution of an intelligent policy by Congress toward executive agreements is complicated very badly by the obvious fact that the term is in itself a cloak for a wide variety of agreements with foreign states, agreements which vary greatly in their importance but also in their constitutional foundations. Agreements made pursuant to specific statutory instructions from Congress and which conform to the guidelines set forth in a congressional act pose few constitutional problems. The court long ago recognized the legitimacy of this process in *Field v. Clark* (1892). The Reciprocal Trade Agreements Act of 1934, for example, made use of the same technique; so did the Marshall Plan Act, and so on. A variation of this situation occurs when the agreement is made pursuant to a prior treaty to which the Senate has given its constitutional consent. But I believe that even in these instances the Congress is constitutionally entitled to be informed regularly—and not merely by the publication of a State Department treaty series or the like—on the negotiation and consummation of these agreements.

The great difficulty arises when the agreement in question can be regarded as falling in some part within the areas of Presidential constitutional power, real or alleged, either in foreign affairs or because of some other element of Executive constitutional power. Thus the celebrated conversations between Secretary Cordell Hull and Maxim Litvinoff in 1933, which led to American recognition of the Soviet Union, resulted in a whole series of agreements ranging from Soviet debts to religious freedom which did not receive either Senate or Congressional approval, presumably because the President and State Department regarded them as having been made pursuant to the President's constitutional power to receive Ambassadors and other public ministers from foreign states. The result, it can be argued, was a substantial subversion of the treaty making power of the Senate. Again, agreements entered into by the Executive in wartime, on the even of war, or incident to the power settlements immediately incident to the close of hostilities have as a rule had the shield of constitutional sanctity thrown about them, presumably because they are technically arrangements entered into incident to the President's power as commander in chief of the Armed Forces.

But in fact, such arrangements, from the Panama Pact of 1939, to the Cairo Agreement, to the highly secret agreements of Yalta, which went far beyond the area of military field agreements and entered into arrangements not unlike those under which Napoleon and the Czar Alexander divided the world between them at Tilsit, however well-intentioned they may be, go far to subvert the fundamental processes of constitutional government. They cannot be reconciled with either the constitutional prerogatives of the Senate or of Congress, or with the fundamental nature of constitutional government. They are by their nature secret, exclusive, anti-democratic, and, more serious, multi-constitutional in character. The only possible defense for them is the large observation that the very nature of the diplomatic process and the quest for security in an atomic age is at odds with the fundamental character of constitutional government. This may be true but some of us are not willing to surrender quite so simply to an obstruction of this kind.

It is far easier to diagnose the nature of the constitutional difficulty involved than it is to propose remedies. The very fact that idle or tyrannical usurpation is not involved, and that the situation has arisen in response to basic shifts in power, institutional organization, and technology in the modern world means that simplistic injunctions to the effect that the Senate "reassert itself" or that the Congress resort to the impeachment power to control a "rampant Executive" are without any significant meaning and do not deserve to be taken seriously. This does not mean that the problem is insoluble. The proposed bill introduced originally by Senator Ferguson back in 1954 requiring the transmittal of all executive agreements to Congress within a period of 60 days and recently resubmitted in the upper House by Senator Clifford Case is an intelligent if modest step in the right direction. I believe that the constitutional power of Congress to require such submission is beyond question.

Beyond this, consideration ought to be given to a move, either by statute or by constitutional amendment, to aline the power to make executive agreements more adequately with the treatymaking process

once more. This might be done by a stipulation, that all executive agreements, however constitutionally derived, are subject to congressional or senatorial authority, and that those falling in certain categories could not take effect until the Senate or Congress, either by positive action or by negative assent—as was the case with the executive reorganization acts—yield permission for execution. The technique of negative assent might well dispose of the dilemma involved in requiring detailed congressional action on a great mass of minor agreements, most of which have only an inconsequential and routine character. At all events the constitutional issues implicit in executive agreements are too important to allow constitutional development in this field to proceed simply by default. The matter calls for positive action by Congress to defend its prerogative, lest something of the very essence of constitutional democracy be allowed to slip away and perish unnoticed.

Senator ERVIN. I am very much heartened by your view that notwithstanding the problems of a shrunken world and the increase in technological power, that it is still possible for us to save our constitutional system. I tell a story that illustrates how the world has changed. We had an elderly lawyer in North Carolina who was a strong Democrat. He had a young friend who was a rabid Republican. When Franklin Roosevelt first issued his Executive order calling for two Thanksgivings in 1 year, this young Republican lawyer asked this old Democratic lawyer, "What have the Democrats done for us to require that we have two Thanksgiving Days to return thanks for?"

And the Democrat lawyer said, "Well, we might very well use the first Thanksgiving Day to thank the good Lord for the Atlantic Ocean, and the second one to thank Him for the Pacific."

Unfortunately, those oceans have so diminished in relative size that they can no longer be counted as the great blessings that they once were.

I am much concerned about many of these executive agreements. You have pointed out some of them which are most dramatic in their implications. I think about President Roosevelt. It probably had a lot to do with saving the free world, but it was rather a dramatic thing for him out of his own head and imagination to exchange 50 destroyers, even if they were obsolete, in return for bases. If that be a valid exercise of an executive agreement, I see nothing that would prevent the President from saying, "Well, we are going to get some more bases somewhere and, therefore, we will give the countries that yield these bases certain of our States." It is only a question of degree between exercising those two powers.

Professor KELLY. I think the destroyer base deal shows that the President, when he is hard-pressed, and has a good Attorney General, who knows what he has to do, can always get an adequate legal briefing for the defense of any kind of an operation of that kind, if the statutes are researched sufficiently.

You remember that what Attorney General—at that time—Jackson did was to turn up a statute of 1883 for the disposal of scrap military equipment, as well as an inversion of a joint resolution of June 1940, which was intended, if I am not mistaken, to block

exactly that kind of operation. And he used both of these as statutory authority for giving away part of the Navy. I think he had to do what he did, but I don't think it can be defended within the constitutional prerogative of the President nor of the concept of constitutional government.

The tragedy of the thing is, of course—and this is perhaps the essence of the dilemma of our time—that the very nature of this kind of crisis we live in operates in a frame of reference which is anticonstitutional and nonconstitutional. I think before one embarks upon a violent criticism of President Roosevelt, to put the thing in a safely historical context, that one has to recognize the kind of dilemma that he was dealing with there. I think that Congress recognized it at the time. And I think that this kind of dilemma has often been the basis for the paralysis of congressional will, even when it knew that in some fundamental way the constitutional process was being subverted. This was certainly true, I think, at the time of the great debate in 1951, which I think marked a tremendous departure. I would disagree with these people who say, well, we have always done something like this. One authority showed that as of 1950 the President had at least 150 times used the Armed Forces of the United States in the continental hemispheres and adjacent waters in some fashion in quasi-war situations or interventionist situations—Veracruz, Cuba, Santo Domingo, Haiti, and so on. But I think that this overlooks the fact that this was the first time that a President had moved major land forces overseas in such a way as to involve the United States in an assumed confrontation on the level of general major warfare, and that he did this without congressional consent, and indeed technically, except by press announcement, without formal confirmation to the Senate, and that the Senate was in such a dilemma that it didn't know what to do about the matter, and it passed that terrible resolution of April 1951, which just said that it was the sense of the Senate that they really ought to be told about moves of this kind.

Senator ERVIN. That is one of the tragedies of too drastic Presidential action in making executive agreements of this kind, because it paralyzes Congress. And Congress, where it results from timidity on its part, is prevented from doing much to reassert itself.

I had the privilege the other day of arguing for the Senate before the Supreme Court in the case against Senator Gravel. I told the Supreme Court that if I said this on the floor of the Senate what I said about Senator Gravel before the Court, I would probably violate the rules of the Senate which prevent a Senator from saying anything derogatory about another Senator, but it is essential for this Court to establish the legislative privilege of the speech and debate clause, because legislators are about the most timid creatures the good Lord ever created, in my experience.

And then another thing: When the President takes a departure from a constitutional course of action, party politics being what they are, the members of the party of the President, no matter what their personal feelings or their personal convictions may be, they have a tendency to rally, not to the flag but to the President. That is one of the evils.

I think you have given us not only a historical viewpoint as to how the world has changed, but also a philosophical one. I take much consolation out of your feeling, which I share, that if we can find some way to operate these things, within the domain of our Constitution, we should do it.

The more I study the Constitution, the more I am convinced of its wisdom. For example, I think that the power of the President to repel an invasion, or threatened invasion, without waiting for the Congress to act, shows the wisdom of the man who drew that instrument. That power, in and of itself, assuming that Congress provides an adequate defense system, is about as good a security in this very precarious world as can be found in any kind of executive agreements that are made without Congress ever having any participation in them or any knowledge of their making.

Professor KELLY. Agreed.

Professor MILLER. I have a couple of questions, if I may, sir.

I might begin by saying that Justice Jackson, when he was a member of the Supreme Court, took a somewhat different view of the Presidential power than he did when he was Attorney General. And when he was criticized by Chief Justice Vinson for his opinion upholding the seizure of an aircraft plant in 1942, he answered, "Yes, I did do that, but I spoke then as the President's lawyer and now I am a Justice of the Supreme Court." Presumably, the President's lawyer and the Justice of the Supreme Court would have different perspectives.

Professor KELLY. In the Japanese removal cases, you may recall Justice Jackson took the attitude that there was no possible constitutional defense of what happened, and that all you could say in effect was that this kind of thing was inherent in the nature of modern war, but that the Government shouldn't try to come before the Court and defend what had happened—which was quite different from the position he took in the case of the destroyer base.

Professor MILLER. Yes, sir; I think he was a great Justice and a great Attorney General.

Professor KELLY. I think he was, too.

Professor MILLER. I think greater as a Justice.

Senator ERVIN. Maybe the explanation is that as lawyers we sometimes have unworthy clients, but as Judges we have no clients as such, except our country.

Professor KELLY. Maybe so.

Professor MILLER. Professor Kelly, I think the subcommittee is seriously interested in the nature of the constitutionality of a statute similar to but not the same as S. 3475. Do you see any impediment to the passage of such a statute?

Professor KELLY. I am not afraid to grapple with the argument that Congress doesn't have the constitutional power—let me go this far—by statute to establish the proposition that it has a right to documents of this kind. I don't think executive agreements are subordinate to the area of executive privilege, for example. I would admit that there is a kind of area of executive privilege in the living Constitution with respect to foreign policy regardless of cases. That is certainly true historically. But I don't think that that doctrine

can be extended to the proposition that resultant formal agreements that have the character of law and which, as we know from the *Pink* case and others, can be enforced internally as law, can't then be demanded by the Congress of the United States. I am not really arguing anything except my basic knowledge of the Constitution and the feeling for reality in relation to this. But that seems to me to make good sense. And I don't see the constitutional argument against this.

Professor MILLER. Senator Ervin's bill goes somewhat further than that and yet requires submission and at least 60 days hiatus.

Professor KELLY. Yes; I know.

Professor MILLER. Do you see any constitutional obstacle to this?

Professor KELLY. I see no constitutional obstacle. If the President of the United States signs this bill into law, or allows it to go by default, I don't see any constitutional obstacle to this process. It would seem to constitute an agreement between the President and the Congress as to policy, and I don't quite understand what the constitutional obstacle would be.

Professor MILLER. Would the proposition that the Executive has an inherent power to conclude certain agreements bother you in this respect?

Professor KELLY. I don't understand it. I would defend the arguments for Executive prerogative power if we mean that the two or three items in the Constitution which in too brief language describe the sweep of Executive power in foreign affairs don't really put everything in the basket of foreign policy power. We all know that the power to send and receive ambassadors, to appoint ministers, to make treaties by and with the consent of two-thirds of the Senators present, isn't the aggregate power of the United States in foreign affairs. And to this extent, I think everybody accepts Hamilton's specific argument for a prerogative power. And one could go on from there and argue that there are certain constitutional areas of Presidential power which rest not only on prerogative, but on a derived Executive authority. Obviously, the area of an Executive recognition of foreign states is one; and armistice field agreements are another, and so on.

But I fail to see how the concept that Congress retains a general supervisory power interferes in any way, legitimate way with the powers of the President. The argument becomes one that the President is so invested totally with the general aura prerogative power that he cannot even by agreement with Congress enter into an agreement for some cooperative arrangement. And this argument leaves me skeptical.

Professor MILLER. Would this be an undue impediment on the conduct of foreign affairs by the Executive?

Professor KELLY. Certainly it doesn't place any impediment on negotiation. It places no impediment on negotiation at all; it doesn't pretend to place an impediment on a negotiation. If we argue that negotiation is implied in the specific constitutional grants to the President, or lies within this area of implied Executive or inherent Executive authority, it places no limitation on that, that is to say, the notion that the President is subordinate to the Constitution on

the constitutional processes is certainly not at odds with the very large inherent power in foreign policy. That is a general proposition that I have put up. I don't quite get the argument that because there is an executive prerogative it lies in such a sacrosanct area that it cannot be manipulated or subjected to Congressional-Presidential agreement. This I don't get. And I don't think that this process pragmatically would interfere with the presidential capacity to conduct negotiations with foreign states. If there are questions of high policy involved in such agreements, than I am enough of a bloody reactionary on constitutional process to think that agreements involving high policy between the United States and foreign states should be subjected to the treaty power or to the will of the two Houses. And I would have to stand by the proposition that I think that is sound constitutional procedure, well recognizing that it frequently is not properly observed.

Professor MILLER. We heard testimony this morning from Dean Fisher of the Georgetown Law Center that President Nixon, by his act in the Shanghai Declaration, unilaterally made a commitment which bound the United States to do something, though it wasn't quite clear what, with respect to Taiwan. Now, I recognize that this is putting it very vaguely and broadly. I wonder if you would care to comment on how the President could commit this country to do anything about Taiwan, over which we have no sovereignty whatever.

Professor KELLY. Let me begin by saying that I am generally rather skeptical about presidential declarations of this kind, as to their force and effect. I think if we went to work we could get a long list of instances of declarations of this kind which had no great meaning afterward. I am thinking in the back of four or five of them offhand which did actually constitute anything except a general expression of policy on the part of the President of the United States, and as circumstances later evolved, they either turned into living policy or did not, depending on how things went. So I would begin with an expression of that kind of skepticism about them. All Presidents, certainly in the 20th century, have indulged themselves very largely in posturing of this sort, and have usually been protected later by the fact that more often than not the pronouncement never was resolved in hard policy, or if it was so resolved, it frequently acquired a statutory basis which eventually resolved the constitutional problem. The Marshall Plan began with large affirmations of this kind in a speech on the Harvard Campus. But it was eventually translated into policy by the Congress of the United States and so on. I don't see how it could possibly be argued, for example, that the agreements of the United States with respect to the two Polish Governments, at Yalta—to take only one of the open provisions of those agreements—constituted in any sense the supreme law of the land within the meaning of article VI, paragraph 2, and would be recognized by the courts if the issue of their validity ever arose there, or could be translated into anything that could be regarded as internal law in the United States. Presidents are well aware, I think, of the fact that that is not going to happen.

Now, if you took the Shanghai Declaration and put it within this context, you could make constitutional sense, if it means to say this:

"it will be the policy of my administration, subject to the limitations placed upon me by the constitution and laws of the United States, to act to defend this area of the Pacific and this nation-state." Then it becomes an acceptable proposition to which no one can take any constitutional exception. But presidents don't ordinarily do it that way. But if this is what the Shanghai Declaration means, then there can't be any constitutional argument about it. You could even get down to the proposition, of course, that the United States has a series of treaties with Taiwan, with the help of China, and these treaties are again by paragraph 2 of article VI the supreme law of the land. And there may be constitutional readings of those treaties which would permit the President, within a limited frame of reference, to defend the area. But we should not forget article V of the NATO treaty, which specifically recognizes the war power of Congress, and which by implication lays a limitation upon the United States. The same limitation is incorporated against resort to war without congressional consent in practically all but two or three of the other 44-odd defense treaties of this kind. So, obviously, the Shanghai Declaration has implicit in it the limitations of the article V type of limitation, if I could call it that.

Professor MILLER. Thank you, sir. No further questions.

Senator ERVIN. I want to thank you for a most helpful and also most interesting exposition of your views. It approaches the problem from a different angle than any other witness has approached it from. And for that reason, it throws much light on the question.

Professor KELLY. Thank you very much, Senator.

And thank you, gentlemen.

BIOGRAPHICAL INFORMATION—ALFRED H. KELLY

Date of Birth.—June 23, 1907—Pekin, Ill.

Degrees.—University of Chicago, 1931, Ph.B., University of Chicago, 1934, M.A., University of Chicago, 1938, Ph.D.

Publications.—Author (with W. A. Harbison) *The American Constitution: Its Origins and Development*, W. W. Norton and Company, 1948, 1955, 1963, 1970. Author and Editor, *Foundations of Freedom* (a series of essays on constitutional liberty) N.Y. Harper and Brothers 1958. Also *American Foreign Policy and American Democracy*, Wayne State University Press 1954. Also various professional and popular articles.

Positions.—Instructor Wayne University October, 1935—September, 1940; Assistant Professor, Wayne University, September, 1940—September 1946; (Leave of Absence, Military Service, 1944–46) Associate Professor, Wayne University, September, 1946—September 1952; Full Professor and Chairman, Department of History, Wayne State University,¹ September 1952—present. Co-Director, Research and Drafting, Michigan Constitutional Convention, 1961–62. Also, please see recent edition of WHO'S WHO.

Mr. EDMISTEN. Mr. Chairman, the last witness today is Professor Richard A. Falk, Woodrow Wilson School, Princeton University.

Senator ERVIN. I want to welcome you to the subcommittee, and express our appreciation to you for your willingness to come and give us the benefit of your views in this very intriguing and important area of our national life.

¹ In 1956, the title of Wayne University was changed to Wayne State University, when we became a state university.

**STATEMENT OF PROF. RICHARD A. FALK, JR., WOODROW
WILSON SCHOOL, PRINCETON UNIVERSITY**

Professor FALK. With your permission, Mr. Chairman, instead of attempting to read the full statement that I have submitted to the subcommittee, I will summarize its main points.

Senator ERVIN. That will be entirely satisfactory to the subcommittee, but I would like to have the statement printed in full immediately after your presentation.

Professor FALK. Fine. Thank you very much.

It seems to me that the basic issue that is confronting the Nation and this subcommittee has to do with trying to cope with the trend toward increasing concentrations of power in the executive branch of Government, particularly in the area of foreign affairs. The use by the President of executive agreements to bind the country to foreign governments is a specific instance of a broader problem.

In my view, the overall context in which we are trying to consider the proper relation of Congress to these executive agreements is what I regard to be a deepening constitutional crisis of serious proportions, a crisis which centers upon a growing imbalance between the executive and legislative branches in matters of foreign affairs, and the failure to date by Congress to take action, either to redress the balance or to enforce upon the President the spirit and letter of the Constitution.

And I view, therefore, very affirmatively, the proposed legislation before this subcommittee as a critical and positive step in attempting to overcome this constitutional crisis and to restore the basis for constitutional government in this society.

I would like to comment specifically on S. 3475, but first briefly to make two introductory comments. The first refers to the context within which we approach the question of balance of powers in the setting of executive agreements. The second set of introductory considerations has to do with the character of the constitutional structure as it bears upon the role of the executive and legislative branches vis-à-vis executive agreements.

As far as the context of these issues is concerned, it seems to me that what is fundamental to this context is the extent to which the persistence of the Vietnam War has destroyed the executive-legislative consensus that has existed since the end of World War II, on the matters of foreign affairs. The serious constitutional questions raised by the American involvement in Indochina have for years been clear to many of those concerned with the legal status of the war, and a more vigilant Congress in relation to these issues would have better served the national interest. It is only with the failure of the actual policies in Vietnam and the split in public support for those policies that I think Congress has begun to make a serious effort to question the constitutional grounds upon which the President was acting in a Vietnam-type of situation.

As a result of looking for the constitutional basis of the Vietnam involvement, I think it became clear to many inquirers that the problems were a good deal broader than those posed by the war in Vietnam. Indeed a whole series of related undertakings that

involved real commitments by the executive branch in the security area had been made by the President without any adequate participation on the part of Congress. The most spectacular, I suppose, of these related commitments was the secret American agreement to come to Thailand's defense in the event of certain internal contingencies, namely, specified increases in the level of insurgency in Thailand. This was a particularly important occasion, it seems to me, on which the executive branch on its own powers entered into agreements with foreign governments by means that, if they should have been used at all, should have been embodied in some kind of formal agreement, probably in the form of a treaty.

I think, though, that the problems of a widening character that we at once perceive in questioning the Vietnam involvement branch into even broader concerns involving the entire commitment process secretly conducted in many areas of American foreign involvement. The way in which the executive branch has authorized the Central Intelligence Agency to act in foreign societies without any authorization from Congress has a distinct relevance here. Perhaps the most extreme example is the extent to which the CIA in Laos has been training and equipping mercenary soldiers, including recruits from Thailand, to carry on a major American overseas activity involving sustained warfare, without the knowledge of Congress generally until very recently. Therefore, what I am really suggesting is that executive agreements, such as the Spain and Portugal base agreements, form part of an overall trend towards an increasing unilateralism on the part of the Executive in making binding commitments in the security area without soliciting adequate congressional participation as it was envisioned in my view by the Constitution.

It seems to me very important in assessing these base agreements, for example to be aware that they look rather innocuous at first glance, and it may be true, as Professor Moore indicated in his earlier testimony, that only rather remote contingencies pose any threat of a direct American military involvement. The critical thing to recognize, however, is that usually the Government gives something significant in exchange for obtaining such base agreements, and what is given may be politically controversial in the United States.

The executive agreement provides the President with a way of entering into dubious commitments of this sort that may not be supported by the American public, and without by and large any kind of congressional scrutiny. It is only in recent years that the kind of scrutiny that is involved in these hearings has taken place at all.

In my view, the context set by the Vietnam war, by the use and abuse of secrecy and covert operations by the executive branch, and by the entry into politically controversial and morally unpalatable arrangements with foreign governments by way of executive agreement, make it both desirable and necessary to define somewhat more clearly and directly the President's power in this area.

The other kind of background considerations that I want to refer to briefly are issues of constitutional structure. Here it seems to me that it is exceedingly important to take account of the change in the overall setting of foreign affairs and the character of government that has taken place since the Constitution was initially framed.

First of all, the United States in the 18th century was in a position of relative isolation in the world, and there were relatively few international commitments that involved the country in the sort of situations that have become commonplace since the end of World War II. The notion of stationing American forces outside the Western Hemisphere, for instance, had no relevance to the sort of world order system that existed at the time the Constitution was formulated. And, therefore, there was obviously no need to assert a particular congressional role in relation to these sort of involvements; to the extent these involvements were contemplated at all I think, they were thought to be embraced almost totally by the treaty power and the checks on executive abuse that were embodied in it.

A perhaps less apparent but more significant development which bears on the subject matter has been the change in the whole structure of government brought about by the uneven growth of the executive and legislative bureaucracies dealing with foreign affairs since the end of World War II. The great expansion of the executive branch and the many complicated transactions that it deals with make it extremely difficult for Congress, without taking some offsetting steps, to be in any firm position to pass judgment and assert their constitutional obligations in relation to the exercise by the President of his power to commit the Government.

Therefore, it seems to me that it is essential for Congress to take measures to neutralize the impact of the enormous buildup of the executive bureaucracy in those areas, and to curb the tendency of the Executive to rely on highly confidential and secret material in order to justify policies and commitments that might otherwise seem controversial.

A final structural shift, it seems to me, that is important to bring to the attention of the committee, is the altered relevance of international law with respect to undertakings of Government in the area of war and peace. The entire effort, it seems to me, by the international community to restrict the legal discretion of States to use force in international affairs has resulted in a set of treaty obligations. Congress has an unfulfilled obligation to implement these treaty rules. Such developments in international law were not contemplated when the Constitution was drafted. Both legal interest and national policy interests require that the means be available for Congress to enforce the Constitution and the treaties that have been entered into under the Constitution with respect to the whole subject matter of war and peace. To do that, it seems to me, is exceedingly difficult unless Congress asserts its role in a more explicit and direct fashion than heretofore and thereby participates in assessing the degree to which undertakings of Government do indeed conform to international law and the charter of the United Nations.

I think one of the lessons that we can learn in retrospect about the Indochina involvement is that if we had adhered a decade ago to international law and the charter of the United Nations, this country and world relations would be in a much healthier condition at the present time. Given particularly the awesome realities of the nuclear age, it is exceedingly important that these international legal perspectives be brought to bear on the kind of commitments

that have been entered into by the President in the form of the executive agreement process that are barely noticed and in some instances not even known.

This brings me to S. 3475. First, let me say that I strongly support the central initiative that is embodied in that bill, and feel that it provides a suitable mechanism for congressional participation in the national commitment process that proceeds by way of executive agreements. It seems to me that passage of this bill would close a gaping constitutional loophole in the notion of balance of powers as well as signal to the executive branch that it is no longer possible for it to evade congressional scrutiny by entering into controversial, unpopular, or even illegal international commitments in the form of disclosed and undisclosed executive agreements.

I would regard the enactment of S. 3475 in its present form as a very positive step forward, and I certainly would support it. There are, however, a few specific respects in which this proposed legislation could, in my view, be strengthened, and I would like to mention those briefly.

The first point, which I gather Senator Fulbright mentioned yesterday, is that it would be sufficient protection to the executive branch's role in foreign affairs if a resolution of disapproval with respect to an executive agreement took effect if it were passed by either House. This would bring the executive agreement process onto a level of closer parity to that of the treaty-making process, with its two-thirds requirement.

The second concern that I would like to call to your attention is my sense that it is not entirely desirable to restrict without limitation the President's injunction of secrecy. It seems to me that in the area of national security policy in particular, it is important to keep the public informed about outstanding commitments. There is no constitutional or judicial basis that I am aware of, that allows the Executive any kind of absolute prerogative to issue an injunction of secrecy that cannot be challenged. Indeed, I would favor attempting by legislation to impose a burden of justification upon the executive branch in the event that its injunction of secrecy is challenged in Congress. Perhaps this effort to limit the use of the injunction of secrecy might be confined to Executive agreements concerned with security commitments.

I would also suggest that the definition of executive agreement may not be broad enough in the statute as it is now formulated. It seems to me that one is also concerned with the kinds of commitments that were referred to in prior testimony arising out of a document like the Shanghai Communiqué. A series of possible implementations of broad commitments is implicit in a unilateral assertion of policy by the President such as is embodied in the Nixon Doctrine. A second set of related problems, it seems to me, arises from the President's capacity to alter the significance of Congressional approval by placing on a treaty or executive agreement a controversial or dubious construction that is quite contrary to what was generally understood at the time of passage. Many people—and I would include myself among them—feel that President Johnson did that in relation to the SEATO Treaty. The problem is the same whether the obligation is embodied in a treaty or an executive agreement.

My final remark on S. 3475 is that it does seem desirable to reiterate the interest of Congress in according due reference to the United Nations Charter and international law generally in relation to the substance to Executive agreements entered into by the United States. I feel that one of the things prompting the overall concern is the degree to which the erosion of Constitutionalism has been accompanied by an erosion of respect for international law and the principles of the United Nations Charter. And I believe that the broader issues of separation of power need to be discussed, not only in relation to the framework of Constitutional restraints, but also in relation to the application of the international legal restraints.

Therefore, I would conclude my introduction with the following principal points:

First of all, the passage of S. 3475 would serve the national interest in its present form, although it might be more appropriate to give either House the power to prevent an executive agreement from coming into force by passing a resolution of disapproval. Second, that minor improvements seem possible in relation especially to the injunction of secrecy and the definition of an executive agreement.

And, third, a related issue that might be dealt with in S. 3475 involves questionable, executive interpretations of privately agreed upon earlier commitments embodied in executive agreements.

And, fourth, and finally, an under appreciated aspect of the broader Constitutional crisis with which S. 3475 is concerned involves the failure of the President to conduct foreign affairs in conformity with international law, and the failure of Congress to take action against violations of international law in the event that they occur in a persistent and serious fashion.

Thank you, Mr. Chairman.

(The prepared statement of Professor Falk follows:)

STATEMENT BY RICHARD A. FALK, MILBANK PROFESSOR OF INTERNATIONAL LAW,
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EXECUTIVE AGREEMENTS VERSUS TREATYMAKING POWER

Executive Agreements have been increasingly relied upon by the President in recent years. This reliance is a part of a broader trend toward the concentration of power in the Executive Branch, especially in the area of foreign affairs. This concentration of power is, in my judgment, excessive and dangerous. As matters now stand, there exists a Constitutional crisis of serious proportions, one aspect of which is an imbalance between the Executive and Legislative Branches of government and the failure, to date, of Congress to take action either to redress the balance or to enforce the spirit and letter of the Constitution upon the President. These hearings, and especially the proposed legislation before this Subcommittee, are steps in the direction of restoring the basis for constitutional government in this country.

Executive Agreements of various sorts, especially those which are kept secret, are a particularly menacing way in which the President can make commitments for this country that may entail direct or indirect participation by the United States in foreign wars. These commitments are often kept secret precisely because there is anxiety about public reaction to them in this country. As well, if such commitments are entered into by way of Executive Agreements rather than Treaties, then the President is able to bind the government without involving Congress in the process at all. Such a technique of shaping the commitment structure of this nation is inconsistent with the entire spirit of the Constitution, especially as it bears on separation of powers in the area of foreign affairs.

Before commenting on S. 3475, I would like to mention briefly some general considerations that underlie my more specific recommendations. These considerations bear on the broader concerns of these Hearings with Executive encroachment on the Constitutional distribution of powers, especially to the extent that this distribution relied upon a system of checks and balances to assure that no one branch of government dominated the others or, for reasons of its own, encroached upon the notion of limited government that is the essence of both constitutionalism and federalism.

Contextual Considerations.—This Constitutional crisis is generated, it seems clear, by a change in the broader political setting in this country. The persistence of the Vietnam War has largely destroyed the Executive-Legislative consensus that has existed in the area of foreign affairs since the end of World War II. Throughout the Vietnam War the President has been willing to commit American forces to battle without obtaining a clear mandate of approval from the Congress. Historical research, the Pentagon Papers, and the course of Executive policy suggest that the American involvement in the Vietnam War rested on shaky Constitutional grounds, accentuated by the Executive Branch's willingness to distort and manipulate information and intention to obtain Congressional support. During various inquiries into the Vietnam War it became clear that the Executive Branch had made national commitments to other governments involving an American undertaking to provide protection in the event that certain security contingencies arose. These undertakings were made, in part, to obtain base privileges and political support in Vietnam. An American agreement to come to Thailand's defense in certain contingencies seemed a particularly important occasion on which an Executive Agreement apparently offered a commitment that should have been made, if at all, by means of the treaty process.

The particular crisis associated with the Vietnam War is an aspect of the growing reliance by the Executive upon secrecy and covert operations. Secret undertakings, justified by the invocation or selective release of secret information, are used by the President to manipulate the public and Congress. Some Executive undertakings are even implemented covertly so that the entire commitment process from beginning to end is neither disclosed by the Executive nor authorized by Congress. The role of the CIA in foreign societies is a particularly flagrant example of this tendency. The CIA's role in training and equipping of mercenary soldiers in Laos, some of whom are recruited in Thailand, illustrates the sort of overseas American activity that is carried on for years without any kind of legislative mandate or oversight. Obviously, the better regulation of the President's authority to enter Executive Agreements cannot deal altogether with these concerns. Many of these most controversial activities of the Executive Branch are probably carried on without any explicit form of agreement with a foreign government, and on occasion are Executive initiatives *against* the constituted government. For instance, as early as 1954 the United States Government had authorized covert paramilitary operations in North Vietnamese territory.

In recent years, also, the President has used the Executive Agreement route to avoid Congressional confrontations in relation to controversial undertakings where scrutiny is most needed. One area of recent concern involves military base agreements with undemocratic foreign governments such as Spain or Portugal. The Executive Branch relies on Executive Agreements to avoid giving such arrangements more attention than needed, and especially, it may wish to hide the reciprocal side of such agreements—what the United States gave up in exchange for securing military bases in foreign countries. In relation to Spain the United States will be providing military equipment that could be used against a future insurgency, whereas in relation to Portugal the grants of \$435 million in credits helps perpetuate the largest lingering empire in the world that cruelly denies independence to several black nations in Africa.

Particularly since the Sino-Soviet conflict and the establishment of some national contact with the People's Republic of China, there is a growing national mood of concern about the appropriate extent of an American overseas military presence and a healthy questioning of the overall psychology of the cold war. Executive willingness to rely on Executive Agreements, as in the case of the Bahrain base arrangements, illustrates a dangerous willingness to enter new kinds of undertakings in a manner that evades the Senate's role in the treaty process and perpetuates the outworn assumptions of the cold war.

In conclusion, the context set by the Vietnam War, by the use and abuse of secrecy and covert operations by the Executive Branch, and by the entry into politically controversial and morally unpalatable arrangements with foreign governments by way of Executive Agreement, makes it desirable and necessary to define more clearly and curb the President's power in this area.

Considerations of structure.—The national mood is essential to the maintenance of Constitutional government in this country. It must be acknowledged, in other words, that a national consensus supporting the Executive Branch in relation to carrying on the cold war was more responsible for the erosion of constitutionalism in this country since World War II than was the structure of the Constitution. The Congress had the power to deal with a President who carried on undeclared wars in several countries for a period of years if the political will to do so had been present. Since the Congressional repeal of the Tonkin Gulf Resolution in 1970 and its enactment into law on January 12, 1971, by signature of President Nixon, the war in Indochina has proceeded against four different countries without either Constitutional basis or Congressional authorization. The President claims to be taking action to protect withdrawing American troops sound particularly hollow when used to justify large-scale and sustained military action in the northern parts of Laos or North Vietnam. Of course, a President may claim that any military action, however remote, is associated with protecting American forces, but for Congress to accept an implausible claim to this effect, as it has done in recent years, is itself a political judgment without a Constitutional basis. The point is that the broad structure of Constitutional restraints provides only a framework within which the basic notions of distribution of powers and checks and balances must be protected by specific initiatives. The application of this framework to specific situations requires a political disposition to act and a moral conviction that Executive policies are harmful to the national interest. Until the Cambodian invasion in the Spring of 1970 no sufficient mood of political and moral concern existed, and the President was not significantly challenged in relation to his assault on the Constitutional scheme of government in this country. These Hearings are part of a shift of mood that signals an intention by some members of Congress to restore Constitutionalism to this country. In more specific terms, the regulation of the capacity of the President to bind the country by way of Executive Agreements signals both an intention to restore the balance of powers embodied in the structure of the Constitution and disposition to question the wisdom of asserting such a wide-ranging American military presence abroad.

A further structural aspect of this subject arises from the interplay between the growing complexity of the world and the uneven expansion of the Executive and Legislative bureaucracies concerned with foreign affairs. There are many more actors on the world scene each with its own configuration of concerns that bear on perceived American interests than existed in the late 1700's. To be informed about a position on these many issues requires extensive staff work that cannot be handled by Congress in many contexts. As a result, the Executive Branch acquires virtually unfettered control over many areas of foreign relations, which appear obscure at their initial stage, but may later involve the United States in a very significant fashion. These base agreements have that characteristic: for instance, the Bahrain Executive Agreement, to which I have earlier referred, must be understood as part of an overall American decision to exert influence in the Indian Ocean area. Stricter guidelines for Executive-Legislative relationships in the area of foreign affairs will help overcome some of the disadvantages possessed by the Congress when it tries to pass judgment on Executive initiatives that are justified by various technical and expert considerations. It should be appreciated that the Constitution was formulated at a time when international commitments were minimal and where there was no professional bureaucracy that purported special competence on these matters. Now with the huge bureaucracies of the State and Defense Departments it is essential that Congress take steps to neutralize the impact of this buildup as to basic Constitutional arrangements.

A final structural concern has to do with the altered relevance of international law with respect to the undertakings of government in the area of war and peace. Duly ratified treaties are "the supreme law of the land" by virtue of the Constitution and the Supreme Court has indicated that other valid forms of international agreement bind the Nation. The United States has ac-

cepted the framework of the United Nations Charter as the basis for its action in world affairs. The Charter prohibitions on recourse to force are legally binding on the President and Congress; domestic courts have obligations to uphold these limitations on national discretion. As well, there exists an international obligation embodied in Article 33 of the UN Charter to settle international disputes peacefully and by negotiations. The Pentagon Papers clearly demonstrate a persistent pattern of Executive opposition to a negotiated settlement of the various aspects of the Indochina War. These legal limits on national powers didn't exist in any serious form until the Kellogg-Briand Pact of 1928. As a consequence, the Constitution was framed without any regard for limits on the Government's discretion to have recourse to military power. Given the changing character of international law on these matters it becomes increasingly important to adapt our internal legal structure to this set of limits. On a deeper level, it is in the interest of this and other countries to make the rules of the UN Charter as operative a basis for foreign policy as possible. The United States felt so strongly about these issues of world order that it took the lead in prosecuting German and Japanese leaders after World War II for their role in the commission of Crimes against the Peace. The United Nations, as a consequence of American initiative, has several times confirmed the validity of this Nuremberg tradition. Given a world of nuclear arms, this notion of legal restraint presupposes self-enforcement; and given the Executive tendency in our most powerful of nations to maintain prerogatives to use force without regard for legal limits it is essential that Congress begin to insist upon "law and order" in foreign affairs. One consequence of this Charter no-self-defense against armed attack—is to make all alliance commitments either redundant or illegal. In either instance, it is important to assure real Congressional scrutiny. The seemingly innocuous establishment of a military base in a remote, stable region of the world may pass unnoticed until local turbulence poses a threat to the American presence and generates various pressures to take covert or even overt military action to protect that presence.

In conclusion, then, the structure of the Constitution cannot assure that Constitutionalism will prevail. Congressional mood is critical. However, the dramatic expansion of the Executive bureaucracy creates a structural imbalance that provides opportunities for abuse, opportunities that have indeed been used in recent decades. The establishment of stricter Congressional guidelines for permissible Executive action may help to overcome some of the dangers of this imbalance. And, finally, the growth of international law in the area of war and peace creates a framework of legal restraint that didn't exist at the time the Republic was born. There is need now to adapt the living Constitution to these newer limitations by passing appropriate legislation. Such adaptation of the Constitution to the awesome realities of the nuclear age is clearly in the national and world interest.

Comments on S. 3475.—I support strongly the initiative embodied in S. 3475, which seeks to provide a mechanism for Congressional participation in a national commitment process that proceeds by way of Executive Agreement. Passage of S. 3475 would close a gaping Constitutional loophole in the notion of balance of powers, as well as signal to the Executive Branch that it is no longer possible to evade Congressional scrutiny by entering into controversial or unpopular international commitments in the form of Executive Agreements. As earlier parts of my statement make clear, there exists an ample basis for congressional concern in this area. Furthermore, I see no practical impediments to the orderly conduct of foreign affairs in the event that S. 3475 becomes operative law. This legislation doesn't impair the capacity of the President to rely upon Executive Agreements to implement routine transactions carried on within a prior grant of statutory authority. S. 3475 provides Congress with a legislative veto with regard to Executive Agreements that must be exercised within a clear and definite period of limited duration. Any international inconvenience that results is of a lesser character than that associated with the treaty power. It is up to the President to put foreign governments on notice as to the possibility and effects of Congressional disapproval of the Executive Agreement.

One consequence of the enactment of S. 3475 would be to encourage the President to build more support for controversial initiatives in foreign affairs or to desist altogether from commitments that are not likely to solicit support in Congress. One can imagine specific situations in which a progressive Presi-

gency is encumbered by a reactionary Congress, but given the realities of recent American foreign policy and the immense size of the defense budget and bureaucracy, the case for limited restraint seems overwhelming at this juncture of our nation's history.

In some minor respects, I do not believe that S. 3475 goes far enough. First of all, it allows the President to impose an injunction of secrecy on any Executive Agreement. It seems to me that in the area of national security policy, in particular, it is important to keep the public informed about all outstanding commitments. At the very least, it would seem desirable to insert a provision by which a Member of Congress could challenge the injunction of secrecy, and it may even be desirable to have some kind of joint Legislative-Executive panel set up to assess whether the injunction of secrecy is warranted in the event that more than twelve members of either House challenge the injunction of secrecy. It would also seem desirable to impose a burden of justification upon the Executive Branch in the event that its injunction of secrecy is challenged. Perhaps this effort to limit the use of the injunction of secrecy might be confined to Executive Agreements concerned directly or indirectly with the transfer of weaponry, foreign bases, or the delineation of security commitments. As with the underlying effort of S. 3475 it is possible to imagine situations in which secret commitments are desirable, but given the interventionary character of recent American diplomacy the prospects are strong that curbing Executive reliance on secrecy will be generally beneficial.

A second concern relates to the definition of Executive Agreement relied upon in S. 3475. There may be some informal agreements with foreign governments that are not reduced to written form, but imply a willingness to use force or supply arms under certain conditions. There may even be occasions on which a unilateral assertion of Presidential policy—as with the Nixon Doctrine—specifies the manner in which the United States intends to carry out broad security commitments in the future. It seems to me, therefore, that some language might be inserted into Section 2 of S. 3475 that would extend coverage to all undertakings with respect to foreign governments regardless of their form. Or, if this is deemed too extensive, then that any undertaking bearing directly or indirectly on the use of force or transfer of weaponry might be included in the definition of Executive Agreement.

One means by which the Executive Branch has expanded the overseas commitment structure of the United States has been to give a controversial interpretation of a previously ratified treaty. One such interpretation was given by President Lyndon Johnson to the commitments contained in the SEATO Treaty with respect to the American obligation to assist South Vietnam. In particular, Article IV of the SEATO Treaty was construed by the Executive Branch to permit unilateral action by the United States even though the treaty language seemed to contemplate only consultation if the alleged threat was posed by means other than "armed attack" and immediate reporting to the Security Council of the United Nations in the event that action taken was in response to alleged armed attack against the treaty area. My point is that it might be appropriate to give Congress the capacity also to challenge *ex parte* Executive interpretations of earlier treaties or Executive Agreements. It seems desirable to cut off all ways by which the Executive Branch could circumvent Congressional participation in the commitment process. Congress might be given a sixty-day period within which to challenge any controversial Executive construction of an earlier international commitment and nullify that commitment by a concurrent resolution of disapproval passed in both Houses.

There is also a question as to whether the Executive Branch should have the unrestricted right to determine whether a particular commitment be embodied in a treaty or Executive Agreement. Even if S. 3475 became law it would enable the Executive Branch to choose a less rigorous form of Congressional participation than is called for by the Constitution in relation to treaties. Such a streamlined commitment process may be desirable for many routine undertakings, but perhaps the Senate should insist upon the right to treat an Executive Agreement as a treaty if it deems that this is appropriate by majority vote.

Furthermore, it might be appropriate to make explicit reference in S. 3475 to the national concern with upholding the United Nations Charter and international law generally. Such a general directive might emphasize the point that both the President and the Congress are obliged to respect these broader

constraints on national policy. It is worth recalling, as Senator Wayne Morse realized almost a decade ago, that the American involvement in the Indochina War could not have taken place had our leaders shown a diligent respect for the relevant rules and procedures of international law. It is time that we reaffirmed the extent to which a government of laws not men promotes our national values in external as well as in domestic affairs. The broader issues of separation of powers need to be discussed not only in relation to the framework of Constitutional restraints, but also in relation to international legal restraints.

Conclusion and recommendations.—Passage of S. 3475 would serve the national interest in its present form. 2. Minor improvements seem possible in relation to the injunction of secrecy and the definition of Executive Agreement. 3. A related issue that might be dealt with in S. 3475 involves questionable Executive interpretations of validity agreed upon earlier commitments to foreign governments. 4. An under-appreciated aspect of the broader Constitutional crisis with which S. 3475 is concerned involves the failure of the President to conduct foreign affairs in conformity with international law and the failure of Congress to take action in the event of persistent and serious violations of international law by our government.

Senator ERVIN. In my study of the SEATO Treaty, I have reached the conclusion that it placed no obligation in and of itself upon the United States to go to the relief of any other nation which might be attacked, except in cases where our Constitutional processes were followed, which necessarily implied that there should be a consideration by Congress and a declaration of war. Is that your construction?

Professor FALK. Yes, sir, that is certainly my understanding as well. I also think that it was a questionable interpretation of the treaty itself, even without respect to the Constitution, because it seems to me to require under circumstances in which an alleged attack had occurred to envision consultation with other members of the SEATO organization, and not a unilateral response by the United States.

Senator ERVIN. I infer from your statement that it would be very desirable if such a procedure would be brought about, that there be some agreement between the Executive and the legislative branch, for example, as to what kind of agreements that should be embodied in a treaty and what kind should be properly embodied in an Executive agreement.

Professor FALK. Yes, that is correct, Mr. Chairman. I didn't quite know what the best mechanism for doing that would be. It might be that some kind of informal set of guidelines would accomplish that far more satisfactorily than what now exists, which is an exclusive Executive claim of privilege to characterize commitments as appropriate for Executive agreement, and to provide on their own the guidelines that must bind Congress as well.

Senator ERVIN. Under the present practice, is not that left exclusively to the determination of the Executive with no voice being had in the matter by the Congress?

Professor FALK. Yes; and I believe, Senator, that this practice is most unfortunate, and that bad consequences have become apparent since the consensus on foreign policy has begun to crumble.

Senator ERVIN. Now, is it not true that the Constitution in sharing the power with respect to foreign relations between the President and the Congress in general and the Senate, in particular, contemplates that from time to time there will be some friction between

the executive branch of the Government and either the Senate, in particular, or the Congress, in general, in respect to matters that fall in the field of foreign affairs?

Professor FALK. Yes, Senator, I believe that such friction was clearly contemplated, though the magnitude of it, I think, may have been underestimated because of the simpler kind of world that existed, and the isolation of the United States in relation to that world at the time the Constitution was formulated. I think a lot of the so-called living Constitutional judicial interpretation that bears on this question has become outmoded by changes in the overall legal framework within which foreign policy is conducted. Most of the decided cases were adjudicated before the United Nations Charter existed. And these questions haven't seriously been reviewed by the Supreme Court in an appropriate context since the United States agreed to participate in the United Nations system.

Senator ERVIN. This friction was one of the ways which the Founding Fathers contemplated would tend to restrict each department of Government to its proper sphere.

Professor FALK. Yes, precisely.

Senator ERVIN. And it quite naturally results where one department tries to protect itself from encroachment by another department on the specific powers assigned to it by the Constitution.

Professor FALK. Yes, Mr. Chairman. In fact, I think that is what really is contemplated, is that each branch of Government must be vigilant in protecting its domain of responsibility in relation to the Constitution.

Senator ERVIN. And it is your view that Congress should take some definite action to restrict the usurpation of authority by the Executive in this field, and to say that it has the power of the purse after the harm has been done is really not sufficient; is that right?

Professor FALK. Yes, Senator. My own personal view is that I wish the Senate had taken this sort of initiative several years ago, and that it is certainly essential to deal directly, rather than indirectly through appropriations and otherwise, with the responsibility of Congress to participate in the foreign affairs commitment process.

Senator ERVIN. I think that one of the improvements that could be made in the bill would be to change it so as to give the Congress some way in which it could voice its disagreement with the President's determination that a particular executive agreement should be kept secret.

Professor FALK. Yes, I feel very strongly that one of the issues that is at stake is the degree to which the Government as a whole has kept commitments to foreign governments from its own citizens. One of the ways that Congress can bring the issue to the people, and really protect the fundamental premise of a democratic society is to challenge and restrict the Executive reliance on secrecy, which doesn't seem to me to be compatible except in very rare circumstances with the sort of constitutional authority that was envisioned originally.

Senator ERVIN. I am frank to state from my experience in Washington, and from many contacts with the classification of documents and matters of that kind that I think that some of the secrecy is not

so much to preserve the national security as to preserve the security of some politicians in the executive branch of the Government.

Counsel?

Professor MILLER. Just a couple of questions of the same type as I posed to Professor Moore and Professor Kelly.

I would start with an observation about Professor Falk's third point at the bottom of page 8, where he talks about the related issue involving questionable Executive interpretations of validly agreed-upon earlier commitments to foreign governments. There is a question of the authority of the Executive, under the Reciprocal Trade Agreements Act of 1934, which some people thought brought up extremely serious constitutional questions, to enter into multilateral agreements on tariffs and trade when the statute itself really provided for bilateral agreement. I think that the question is really broader than what Professor Falk has suggested and would be obviated, in my judgment, by laying these before Congress so that it could take a look at them. That is mainly by way of observation in amplifying what Professor Falk was saying.

I think one of the important issues is the nature of the constitutional power of Congress to act in this area, Professor Falk. We have heard somewhat different points of view relating to the nature of the constitutional powers of Congress and the inherent powers of the Executive. Do you see any impediment in this bill that might stop Congress from acting in such a way?

Professor FALK. No, I see no serious impediment, Professor Miller, whatsoever. In my view, we are dealing with an area which is quite open constitutionally, where there are only very broad guidelines that have been laid down to vindicate both Executive and congressional claims. This proposed legislation, in my opinion falls easily within a reasonable construction of the congressional role in the foreign affairs process. There is no credible limitation that I can find in the Constitution upon the assertion of this role.

Professor MILLER. What about the question that has been raised by the previous witnesses about the nature of the inherent Executive powers?

Professor FALK. I think a basis does exist for a constitutional argument in support of what the Executive has been doing in recent years. This refers back in my mind in a way to what Senator Ervin referred to in terms of the contemplated friction between the branches of Government in this area. Therefore, ultimately if the executive branch chooses to challenge what seems to me to be a very reasonable effort to redress the imbalance that has grown up in this area, it would be up to the courts to try to resolve that contradictory interpretation of constitutional prerogative. However, existing interpretations of the Constitution in no sense preclude Congress from acting as this bill proposes, and the policy considerations in my view overwhelmingly dictate that Congress should act in this way.

Professor MILLER. Some people have suggested the question of whether or not there is power inherent in the President to recognize foreign governments which Congress, by passing a statute such as this, cannot touch.

Professor FALK. I don't see, first of all, how this would impair the President's capacity to recognize a foreign government. The act of

recognition seems to me to be quite separate from an executive agreement that might accompany a particular recognition. There is no need to embody the act of diplomatic recognition in a commitment to a foreign government. It seems to me to be the conferral of a status by the President, of a kind that doesn't seem to me to be questioned by this legislation, as I understand it.

Professor MILLER. Some witnesses have questioned the ability of Congress to reach the ancillary claim settlements provisions of the Litvinoff assignment, for example.

Professor FALK. As I say, if there are separate commitments entered into with the foreign governments by the Executive, these seem to me to be reachable by Congress. The whole notion of whether they are in executive agreements or treaties seems to me to have no bearing on congressional responsibility to participate in assessing their relationship to the national interest. I think there should be a distinction made between the conferral of status by means of diplomatic recognition and accompanying agreements which I feel are appropriate subjects for congressional scrutiny.

Professor MILLER. One further question. Professor Falk. The policy question was in the sense of hampering the Executive. I have heard it argued by some that this bill is an undue intrusion, a major intervention by the legislature, into the Executive prerogative, and that it would unduly hamper the conduct of foreign affairs. Would you care to comment on that?

Professor FALK. Yes. Professor Miller. In my view, it would be a due hampering of the executive branch that has long been needed in relation to certain kinds of undertakings. The whole point, it seems to me, is that one wants to preserve a congressional role to object effectively to certain kinds of commitments, and there would be no point in this kind of legislation if there wasn't potential confrontation between the Executive's judgment of the national interest and the congressional judgment of the national interest. Underlying the constitutional discretion is the assumption. I think, that the national interest is much better served if there is an concurrence of the Executive and Congress in the development of commitments to foreign governments. We have suffered for some time from the absence of joint participation in this aspect of the commitment process.

Professor MILLER. Thank you, sir.

I have no further questions.

Mr. EDMISTEN. Professor Falk. Dean Fisher and Professor Moore argued this morning that there should be cooperation between the two branches on these matters, and that probably we do not need written laws in this area. Do you believe that the executive branch would cooperate unless it were made to do so?

Professor FALK. This requires both a contextual answer and a structural answer. The recent history of the relationships makes me very skeptical about relying on the mere good faith of the executive branch in cooperating with Congress in sensitive areas of foreign affairs. Therefore I think the case for enacting guidelines that are more formal, more structured, more regularized is very strong and that the kind of legislative initiative embodied in S. 3475 goes a long way towards satisfying that need. Structurally, I think that in certain periods of history—I guess most dramatically during a war

like World War II—one could, in fact, rely on the cooperative relationship between Congress and the Executive, because considerable identity of view existed as to the policy goals of the country. But that is such an exceptional circumstance that it shouldn't provide the continuing basis for constitutional authority which needs to be structured to cope with periods of dissensus as well as period of consensus on the central foreign policy commitments of the country.

Senator ERVIN. It seems to me that in his Farewell Address to the American people, George Washington diagnosed a disease which seems to be endemic among occupants of public office. He characterized this disease as being "love of power and a proneness to abuse it." In my observations of public officials, I have seen that there is a temptation to seek and a thirst and hunger for a little more power than the law gives them. In my judgment that was one of the reasons the Constitution was written—to keep each department of government in its due balance. Would you not agree with me that where the Constitution entrusts a shared power, as it does in the field of foreign relations, to the Executive and to the Legislative, that neither the Executive nor the Legislative can be the sole judge of the limits of the power, and that for this reason, legislation which attempts to define what the legislative branch thinks is a true limit of its power would be helpful for the ultimate solution of problems in this field, because it would make it more certain that the courts which have the power to make the final interpretation would have more occasion to define exactly where the line of demarcation lies between the shared power of the President and the shared power of the Senate, or the shared power of the Congress?

Professor FALK. I agree very much, Senator.

Senator ERVIN. Thank you very much for a very illuminating and helpful exposition.

Professor FALK. Thank you.

Senator ERVIN. Unfortunately, tomorrow, though we have the hearing scheduled to resume, there is a Senate rule that if the Senate has a meeting of the full committee that the subcommittees can't meet. So we have to cancel the hearings tomorrow.

We are very grateful to all those who have participated in the hearings thus far, for the great help they have given us.

(Whereupon, at 4:33 p.m., the subcommittee adjourned, subject to the call of the Chair.)

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**S. 3475—TO HELP PRESERVE THE SEPARATION OF
POWERS AND TO FURTHER THE CONSTITUTIONAL
PREROGATIVES OF CONGRESS BY PROVIDING FOR
CONGRESSIONAL REVIEW OF EXECUTIVE AGREE-
MENTS**

FRIDAY, MAY 12, 1972

**U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.**

The subcommittee met, pursuant to recess at 10:15 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin (chairman of the subcommittee) presiding.

Present: Senator Ervin (presiding).

Also present: Rufus L. Edmisten, chief counsel and staff director; and Prof. Arthur S. Miller, staff consultant.

Senator ERVIN. The subcommittee will come to order.

Will counsel call the first witness?

Mr. EDMISTEN. Mr. Chairman, the first witness is Prof. Alan Swan, who has been with us before in another matter, and we welcome him.

Senator ERVIN. Yes, sir. I remember most pleasantly his previous appearance, and we want to welcome you back to the subcommittee and express our deep appreciation for your appearance and your willingness to give us the benefit of your views on this matter as well as for your previous aid to the committee.

**STATEMENT OF PROF. ALAN SWAN, PROFESSORIAL LECTURER IN
LAW, GRADUATE SCHOOL OF BUSINESS, UNIVERSITY OF
CHICAGO**

Mr. SWAN. I thank you very much, Senator. It is a great pleasure to be here again, and I hope I can discuss the bill before the subcommittee in some detail. If it is all right with the Senator, I would like to proceed with my statement.

Senator ERVIN. That will be entirely all right.

Mr. SWAN. And then take questions.

My personal interest in the constitutional law of executive agreements, and particularly my doubts concerning some of the more expansive claims for the Executive, go back to my days as an executive branch lawyer when I was among the claimants. Since then, time for reflection and investigation has confirmed these doubts and

yielded what I hope is the somewhat more mature view of the problem offered here.

In one narrow sense, of course, the making of international agreements is a wholly Executive function. As "sole organ of external relations," to use Marshall's famous phrase, the Executive alone can conduct negotiations, sign agreements and issue the final utterance necessary for an agreement to become a valid international obligation of the Government. These functions are executive in character, however, precisely because they are instrumental functions necessary to carry out the antecedent policy decision to make an agreement. It is the scope of the President's power to make this policy decision which alone is of interest to us here.

In addressing this subject, I would first state as a major premise my conviction that the vision of Government embodied in the Constitution can be kept alive in the management of our foreign affairs only through a truly collaborative regime in which the President and Congress exhibits a high degree of mutual trust and confidence. I note that this principle is reflected in the preamble to S. 3475. Anything less would force us either to abandon the separation of powers principle—and assign a position of complete supremacy to one branch or the other—or risk a total paralysis in the exercise of governmental responsibility. It can scarcely be believed that the Constitution would force such an unhappy choice upon us. For no society will tolerate governmental paralysis for long. Yet, we today even more than our forefathers, should be aware that there is neither a great divide between the domestic and foreign spheres of our national life nor a unique competence in the Executive to manage the latter.

In applying this broad conception to our topic, I would, through a modest adaptation of Justice Jackson's concurring opinion in the *Steel Seizure* case, suggest the need to deal quite separately with four distinct categories of agreements.

There are agreements made pursuant to an authorization of Congress or an antecedent treaty. These raise no question of the constitutional power of the President. He is merely executing the law. The question instead is whether, by its liberality, Congress has conferred upon the President possibilities for independent action which tend to undermine the maintenance of a truly collaborative regime. I answer that we have gone a long way in this direction, and that with Congress alone lies the solution.

The second category consists of agreements made by the President under his specifically enumerated constitutional powers in areas where Congress possesses concurrent authority but is silent. Here Congress holds a residual power. Should it act and its will become law, the President could no longer invoke his own powers but would be under his usual obligation faithfully to execute the law. Unfortunately, even the brief record offered here shows how this residual power has suffered. Presidents, by ever more expansive interpretations of their enumerated powers, have increasingly succeeded in confronting Congress with events that foreclose alternative policy decisions. Congress in turn has been unable or unwilling to forestall the President by asserting clear and comprehensive policies of its

own. It is the focus on this latter deficiency and, I might add, the refusal to try to legislate an interpretation of the President's powers, that is to me the chief virtue of S. 3475.

A third category consists of agreements not encompassed within any of the President's specifically enumerated powers, but nevertheless made without congressional participation on the theory that the President possess an inherent agreement-making power. This latter is sometimes attributed to the Executive power clause and sometimes is said to flow from the nature of the Presidential office. Whatever its theoretical foundations, it has been used to claim for the President a residual power to make agreements unilaterally on any subject not specifically enumerated in either articles I or II. More importantly, where the agreement touches upon one or more of Congress' enumerated powers—especially the appropriations power—the theory has been employed to justify a commitment, which though carefully made subject to implementing action by Congress, nevertheless, pledges the word of the United States and then places upon Congress the onus of breaking that word if it should fail to pass the necessary legislation. In effect, under this theory, the President has claimed authority to make what amounts to a non-self-executing treaty, without consulting the Senate; a claim nowhere better illustrated than in the case of the recent Spanish Base Rights Agreement.

Finally, a fourth category consists of agreements made by the President on subjects admittedly within his exclusive control. Here again the problem is one of controlling a too expansive interpretation of the Presidential powers. In view of my doubts concerning the efficacy of legislating against such interpretations, I can only suggest that if congressional control is reestablished over agreements in the other three categories, this group should pose no danger to the kind of collaborative regime which I have already suggested is commanded by the Constitution.

It is, of course, not possible here to essay each instance where, under article II, the President may be thought to possess a concurrent or exclusive agreement making power. Instead, I would turn my attention to the inherent power theory. This notion has not only given rise to a wide-ranging presidential substitute for the non-self-executing treaty, but its origins go back to certain theories of Alexander Hamilton which have, in turn, supplied succeeding generations of executive officials with a basic rationale for an ever more expansive view of the President's foreign policy powers.

One is tempted to dismiss the whole idea of an inherent agreement-making power as a loose and irresponsible use of adjectives, to borrow Justice Jackson's phrase. An inherent, among other like powers, the Justice said:

... either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship but it is at least a step in that wrong direction.

Unfortunately, the notion has not yielded to such judicial scoldings, and to understand its vitality, it is wise to begin with Hamilton's defense of Washington's Proclamation of Neutrality of 1793.

The power to declare war and the power to make treaties, Hamilton asserted, are by their nature Executive powers so that their distribution elsewhere by the Constitution was an exception to the general grant of the Executive power clause and hence to be strictly construed. Anything not strictly within them would remain with the Executive. From this he reasoned that the power to interpret, as distinct from making treaties remained with the President, including the power to determine that a treaty required the Nation to go to war and to act upon that determination. This was, he said, an example of a concurrent power, by which the President might place the legislature under an obligation to declare war or at least create an antecedent state of things which Congress ought to weigh carefully in its exercise of its independent powers.

As later events will show, Hamilton's argument has been and remains a potent force. His characterization of the war and treaty powers as inherently Executive when added to the established fact of the President as sole organ of external relations, created a formidable base for later claims that foreign affairs was a uniquely Executive province warranting the most generous interpretation of the President's enumerated foreign policy powers. Then, if treaty-making was an inherent Executive function, the power to make nontreaty agreements must likewise inhere in the President, in spite of the necessary and proper clause. In this way, Hamilton created a new source of both concurrent and residual power encompassing every conceivable subject on which an agreement might be needed. Lastly, by asserting the right of the President to create an antecedent state of things constraining Congress in the exercise of its powers, Hamilton swept away any inhibition that the vast array of grants in article I might otherwise have had upon the exercise of the President's concurrent powers.

While it has taken nearly 170 years for the full implications of the Hamiltonian doctrine to be realized, nothing demonstrates more clearly that we have in fact arrived at that ultimate point than the August 1970, Agreement of Friendship and Cooperation with Spain. As a broad—new—basis for cooperation with the Spanish people, the agreement provides for a range of cooperative activities in education, cultural exchange, scientific and technological research, environment and urban development, agriculture, economic aid and public information. Where, under each of these headings, the United States' commitment is dependent upon appropriations or other legislation, the agreement is dutifully made subject to the requisite congressional action. However, as the Spaniards made only too clear, these provisions are in effect payment by the United States for the right to use Spanish naval and air bases and there can be no doubt that any failure of Congress to provide the legislative support needed would be viewed by Spain as a breach of faith impairing the rights sought to be acquired. Beyond this, and reflecting the basic military purpose of the agreement, are the clauses concerning cooperation for defense. The agreement recites that because the threat to peace is the greatest problem faced by the modern world, the parties agree to remain vigilant, to develop their own defense capabilities and consequently to make compatible their respective defense poli-

cies within the framework of their constitutional processes. The latter reservation, paralleling language in all our mutual security treaties, is a revealing indication that the intent and expectation behind the Spanish agreement is hardly distinguishable from the guaranties contained in those treaties. The altogether disingenuous language appears solely intended to obscure the parallel, presumably for the benefit of argument with the Senate. This becomes patent when it is realized that the agreement was made under the expectation that American Forces would remain in Spain under an elaborate set or working arrangements for joint planning, consultation, and for the conduct of joint military exercises, all of which duplicate in character, if not extent, the NATO structure and which have as one inevitable purpose the defense of Spain. Little wonder that General Wheeler, in a moment of embarrassing candor, assured the Spaniards that the presence of American Armed Forces in Spain constituted a more significant security guarantee than would a written agreement. In short, the President has asserted an inherent constitutional power to commit the Nation to expenditures not yet appropriated, to programs not yet legislated, and to the use of American Armed Forces for the defense of another nation all without any consultation with Congress and under terms where Congress' only choice is to accept the President's action or imperil the good faith of the United States. This is the Hamiltonian theory fully matured.

It hardly needs to be stated that such an assertion of Executive power spells the demise of anything approaching a truly collaborative regime in the making of international agreements. Any theory that has brought us to such a pass deserves the most critical attention.

It should be clear that the Hamiltonian theory proves much too much. An inherent power whether predicated on the Executive power clause or upon the nature of the Presidential office, is a power without subject matter limitation. Since then the supremacy clause confers the force of statute upon any constitutionally valid non-treaty agreement. Hamilton's reasoning means that by making an agreement, the President can confer upon himself complete legislative and executive authority on any subject whatsoever so long as the subject is susceptible of being reduced to the form of an international agreement. Even assuming that under the Hamiltonian theory Congress may by affirmative, contrary action deprive the agreement of statutory force, it hardly seems credible that such an extraordinary deviation from the separation of powers principle is to be found in the vague notion of an inherent power that is nowhere even mentioned in the Constitution. This latter point is the thrust of Madison's answer to Hamilton and Hamilton himself certainly must have had some such doubts. Only 5 years earlier in No. 75 of *The Federalist* he had written:

... The qualities ... indispensable in the management of foreign negotiations point out the Executive as the most fit agent in (the making of treaties) ... ; whilst the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them.

Moreover, if there is a necessity for finding in the Constitution a separable grant of power for the making of nontreaty agreements,

as such, it can be readily found in the grant to Congress under the necessary and proper clause.

Finally, the concept of an inherent Presidential agreement-making power cannot be squared with the history of the treaty-making power in the constitutional convention and finds no support in later judicial authority. Nor is it consistent with the practice of Presidents until we move well into the modern era.

One point which emerges very clearly from the debates in the constitutional convention is that the provision for a senatorial role in treatymaking was not thought of by the framers as establishing an extraordinary exception to what was otherwise deemed an inherently Executive function. Quite the contrary, guided by their own colonial experience, suspicious of the European models offered them, their thinking started with general acceptance of treatymaking as a wholly legislative function, and ended with a clearer perception of the Executive as spokesman for the Nation and as counterweight to the Senate and hence properly the Government's sole agent in the process.

Thus, acting upon several resolutions adopted by the convention, including one proposed by Madison explicitly for the purpose of defining all powers that were by their nature Executive, the Committee on Detail recommended first that "the Senate of the United States shall have power to make treaties," and second, that the Executive shall have power to execute the law, receive ambassadors, and act as Commander-in-Chief to mention the stipulations of immediate interest here. During consideration of the committee's recommendations, the danger of a senatorial aristocracy became a matter of increasing concern to certain members, while others began to perceive more clearly the natural instrumental role that the President should play. Madison suggests, for example, that the President "should be an agent in Treaties," while Gouverneur Morris' proposal for a "council of State" characterized the functions of that body with respect to treaties in much the same terms. When the several questions raised in the debate could not be readily disposed of, the matter was referred to a special committee which then recommended what is substantially the language of article II. Even after acceptance of this recommendation, it remained clear that no change in the role of the Senate was contemplated and that inclusion of the President was in recognition of his place as "agent" in the process. In short, Hamilton's theory of the treaty power seems to have been created out of "whole cloth," a belated effort to resurrect his image, ignored if not rejected by the convention, of the President as a monarch on the model of George III.

If this be true it is hardly conceivable that the framers viewed the making of all other forms of international agreements as a uniquely Executive function. Today, when nontreaty agreements are used on subjects as important and far-reaching as treaties, there is even more reason to reject the Hamilton view.

Consonant with the record of the Constitutional Convention the idea of agreement making as an inherently Executive function can find no support in later judicial authority.

We have already noted Justice Jackson's indictment of the theory. The *Curtiss-Wright* case, although laden with dicta, holds only that

in the area of foreign affairs, a legislative delegation of authority may accord the President "a degree of discretion and freedom . . . which would not be admissible were domestic affairs alone involved." In the famous *Pink* and *Belmont* cases, the court rested the validity of the Litvinov assignments upon the President's recognition power or upon his authority to negotiate the settlement of private claims against foreign governments.

Finally, if we turn to what must necessarily be a too cursory review of the history of executive agreement making, it seems plain that from 1789 to roughly the turn into the 20th century—and this can only be a very approximate dividing line—the actual behavior of our statesmen lends little or no comfort to the latter day Hamiltonians. To the contrary, much in this period shows that these views were generally ignored or even discredited. Specifically, there is in this period, a singular paucity of agreements made without some form of legislative participation either by treaty or legislative action. Such agreements as were made without reference to Congress, were made without aid of an inherent power theory, and without importing an expansive interpretation of the enumerated powers in article II. On subjects given by the Constitution explicitly to Congress, the practice of making agreements contingent upon implementing legislation was extremely sporadic. Instead, treaties followed by legislation was the procedure employed. Finally, in their diplomatic discourse, executive officials displayed what by contemporary standards must be regarded as scrupulous efforts to avoid independent commitments of future action on matters within Congress' purview. If there were to be entanglements, Congress had to approve.

Thus, following the enactment of standing legislation a significant number of agreements were made relating to postal services, the reciprocal modification of navigation acts, recognition of trademarks, patents and copyrights. Specific legislation was passed to authorize an agreement limiting armaments on the Great Lakes—the Rush-Bagot agreement. Periodically the President was authorized by statute to settle war reparations and other claims of the Government. Not until the Tariff Act of 1890, were executive agreements, rather than treaties, employed to adjust tariffs and other restrictions on commerce. Fishing rights, the settlement of boundaries and general agreements for the arbitration of disputes were likewise handled by treaty. Once Mr. Jefferson decided that the purchase of Louisiana by treaty did not require a constitutional amendment, executive agreements were used to annex territory only pursuant to Joint Resolutions of Congress, as in the case of Texas and Hawaii, or in furtherance of an antecedent treaty as with American Samoa, parts of the Philippines, and the final arrangements for the Panama Canal Zone. Naval stations and other minor acquisitions followed upon treaties or specific legislation.

Two situations seemed to have been regularly handled by executive agreement without legislative participation.

Beginning with the settlement of the "Wilmington Packet" claims in 1799, the Executive time and again used executive agreements to settle claims of American citizens against foreign governments and also to establish general arbitral or other settlement machinery for

this purpose. It cannot be doubted, that the protection of private citizens and their property abroad, has always been among the foremost tasks of diplomacy and is within the executive domain. On the same grounds, Justice Frankfurter, concurring in the *Pink* case, found an "indisputable" power in the President to fix the amount of governmental claims, citing as an example the Boxer Indemnity Agreement of 1901, although it might be added, that the disposition of that indemnity once fixed was left to Congress.

Beginning in 1885, a number of executive agreements were made in anticipation of treaty negotiations. Each was justified on emergency or similar grounds, and was operational before the treaty negotiations commenced, but was contingent for its continuance upon the treaty. The settlement of fishing rights in 1885, a prohibition on the killing of seals in the Bering Sea in 1891, and the establishment of a provisional boundary between Canada and Alaska in 1899, were handled in this fashion.

Lastly, and I think most importantly, a not surprising but notable characteristic of this period is the care exhibited by executive officials in avoiding commitments on subjects within Congress' power, particularly the power to decide between peace and war. Thus, after Secretary of State Adams persuaded President Monroe to issue his famous doctrine unilaterally, rather than accept Britain's proposal for a joint declaration, the President insisted that his statement appear in his forthcoming message to Congress. The President wanted it to be, as Bemis has observed, an executive monologue rather than a diplomatic dialogue that might be construed as a guaranty taken with regard to a particular nation. After issuance of the message, Columbia inquired how the United States "intends to resist any interference by the Holy Alliance" in the new republics. Adams responded by pointing out that any action the United States might take would depend on Congress. Five years later, Henry Clay as Secretary of State instructed his Minister in Buenos Aires along the following lines:

The declaration of the late President (Monroe) was that of the head of the Executive Government of the United States. Although there is every reason to believe that the policy which it announced was in conformity with the opinion both of the nation and of Congress, the declaration must be regarded as having been voluntarily made, and not as conveying any pledge or obligation, the performance of which foreign nations have the right to demand.

The Secretary went on to make the obvious point that if ever war should be indicated, "Congress alone" would decide the issue. Clay was not alone. In 1868, Seward, while personally committed to territorial expansion in the Caribbean, irately informed his agent in Port-au-Prince that it was "useless to examine" a Haitian scheme for the grant of base rights to the United States in exchange for financial assistance and a guaranty of Haitian independence. The Executive was, according to Seward, "constitutionally impotent to (accept a scheme) . . . Congress would never sanction."

Perhaps these appearances of scruple, were only because our statesmen found the posture expedient. Even so, they furnished an important precedent for the kind of behavior the Constitution enjoins upon all our statesmen. For it is precisely when it becomes

inexpedient for one branch of government to respect the bounds on its authority, that the Constitution speaks loudest, or there is no purpose in it.

If the record of executive behavior during the first hundred and twenty or so years of our Constitutional history fails to comport with the theory of an "inherent" Presidential agreement making power, the picture changes as we enter the twentieth century. But it is a change that takes time to develop. A 1905 "Memorandum of Conversation" between Secretary of State Taft and the Japanese Foreign Minister concerning the preservation of peace in Asia, the 1908 Root-Takahira Agreements regarding the territorial integrity of China, and the so-called "Gentleman's Agreement" of the same year, illustrate how by the end of the first decade of this century, the Executive had begun to move, but gingerly, along a spectrum between a mere unilateral declaration of Presidential policy and a pledge of action fixing "an antecedent state of things" upon the exercise of Congress' power.

Likewise, in 1905, President Theodore Roosevelt, confronted by a reluctant Senate, went ahead and implemented a "protocol" placing the collection of Dominican customs revenues and the service of its external debt under American control. Not until 1907 did the Senate approve. Perhaps this was an exceptional event; the mere exercise of the President's traditional claim settlement power. Certainly he was within his powers as Commander in Chief in ordering the fleet to cruise off Dominican waters, during the "protocol" negotiations. Yet, had not Roosevelt paved the way, Woodrow Wilson could not have, in 1915 when insurgents attacked Port-au-Prince, ordered the marines to land, initially to protect American lives and property, but then to pacify the entire country and force upon the Haitians a treaty, making their nation a United States protectorate for 20 years; a treaty not approved by the Senate until the following year.

With these and similar events in Mexico, Nicaragua and again in the Dominican Republic, the stage was set for the Nation to move into its central position in world affairs, and in the process to witness the final assault on the collaborative regime of our constitutional tradition.

Franklin Roosevelt having warned France in June of 1940 that "only Congress could give" a military commitment, nevertheless, found it within his constitutional power the next year to occupy and give Denmark a pledge to defend Greenland, to assume the defense of Iceland, and to agree with Britain on securing the approaches between Iceland and the United States, and to implement that agreement by ordering the Navy to escort British convoys and to hunt and destroy German submarines.

While the record of the postwar period is too well known to require extended comment here, and I have already mentioned the Spanish Base Rights Agreement, another major feature that deserves note is the curious transformation that has occurred in our mutual security treaty commitments. In all these treaties, the United States, at the insistence of the Senate, has carefully refused to commit itself to military action, except, as Secretary Acheson put it, when the "exercise of honest judgment" in accordance with con-

stitutional procedures dictates such action. Then, however, successive Presidents, citing Roosevelt and Wilson, have claimed an independent power first to station troops overseas in the areas covered by the treaty, second to defend those troops if attacked and third, acknowledging the obvious connection between the defense of our troops and the general defense of our treaty partner, to make explicit commitments to military action with only questions of extent and duration remaining open. As several foreign governments have recognized, our troops are hostage to American participation in their wars. If Hamilton must be disregarded as a theorist, he has been vindicated as a prophet. And measured against the words and the intentions of the Constitution and against the standard of conduct observed by our statesmen through the first hundred and twenty or more years of history, fulfillment of such a prophesy can hardly be viewed as a triumph of constitutional government.

In closing, Mr. Chairman, let me say, it hardly needs saying that I support S. 3475, as one, potentially far-reaching first step toward the restoration of effective Executive-congressional collaboration in the making of international agreements. I do believe that there are some changes that might be considered in the bill, but these can wait, for I have imposed upon the committee long enough. I thank you for your patience and will be glad to answer any questions you may have.

Senator ERVIN. I certainly agree with you that there ought to be some changes made in the measure, and I would deeply appreciate it if you would take the trouble to indicate in a letter to the subcommittee any suggested changes you might think would improve it.

Mr. SWAN. I would be delighted to do that, sir.

Senator ERVIN. We have often heard the inherent power claim advanced lately, not only in the field of foreign relations, but also in the field of domestic affairs, including law enforcement.

Mr. SWAN. Yes.

Senator ERVIN. The theory is advanced by the Department of Justice that the President has inherent power to place suspected domestic subversives, as they are called, under electronic surveillance without any order of a court.

Mr. SWAN. Yes.

Senator ERVIN. To my mind, that is an assertion that there is some power on the part of the President to suspend the Fourth amendment.

Mr. SWAN. I agree.

Senator ERVIN. Circuit Judge Edwards made a very fine decision by denying any such inherent power existed, and I hope the Supreme Court affirms that very excellent opinion.

Mr. SWAN. I trust they will do so, Senator.

Senator ERVIN. The claim of inherent power is fundamentally based, as I understand it, on the provisions of section 1 of article II of the Constitution, which states that the executive powers shall be vested in the President of the United States of America.

Mr. SWAN. Yes, sir.

Senator ERVIN. The doctrine of inherent power is based, as I understand it, fundamentally on the proposition that this clause of

the Constitution vested in the President inherent power to do things which are not mentioned at all in the Constitution.

Mr. SWAN. I understand that is the basis. Certainly that was Hamilton's assertion.

Senator ERVIN. And also, in some sense, as I construe your statement, to authorize the President to do things which cannot be reconciled with the specific provisions of the Constitution.

Mr. SWAN. I agree, sir. Let me make two points in response to this. First, the notion that the executive power clause is a conference of power, and certainly the notion that it confers a broad inherent power to make international agreements, are very suspect propositions. The executive power clause was an innovation of the last minute by the Committee of Style in the Constitutional Convention, and there was no indication that they ever thought of this as being a conference of power. Second, I think in large part these notions are inconsistent with the "necessary and proper clause," and have led to the practice of President's claiming a power in a national spirit to make agreements on subjects which the Constitution places squarely into the hands of the Congress.

Senator ERVIN. It also seems to me that "Executive power" in simple language means the power and the duty to execute the laws.

Mr. SWAN. I sympathize with that view. Historically, at the point when Madison proposed that the Constitutional Convention change the Virginia plan to specifically enumerate what the inherent powers of the President were, the Convention limited its enumeration to one thing, the power to execute the law. It was then that the Committee of Detail under its broad charter began to add the power to act as Commander-in-Chief, the power to receive ambassadors, and the appointment power.

Senator ERVIN. I find myself incapable of accepting the inherent power theory because it seems to me that the very reason the Constitution was written was to establish a government and provide what powers that government was to have and how those powers were to be exercised. Of course, later the Bill of Rights was added, and the Constitution now has as one of its prime purposes the protection of individual rights as against the Government. But, the fundamental reason, it seems to me, why the Constitution was written and ratified was to establish a government of laws, and the Constitution as the supreme law which was binding. As the Supreme Court said in *Ex parte Milligan*, the Constitution established a law for rulers and people alike, and that when the President assumes the power to make such agreements as he did in respect to the Spanish bases, he is in effect usurping the power of Congress in legislative matters, as you pointed out, with respect to appropriations and other things. Unfortunately, as you point out so effectively, agreements of that nature put Congress in the very bad position of either having to go along with the President in agreements of which Congress may not approve, or of taking action which foreign nations will construe to be a breach of faith on the part of the American Government.

Mr. SWAN. Senator, I think that this is a point which needs emphasis, because it is a fairly recent development. There is no doubt that the President can go ahead and negotiate with a foreign

government on a topic of mutual interest, and inform the foreign government that his power does not extend to making a commitment of the Government of the United States until Congress has approved it on an ad referendum basis. He can go ahead and do that, as the diplomatic agent of the country.

Now, unfortunately, I think we have arrived at the point where building on this power, the President has negotiated comprehensive new relationships, or continuing relationships with foreign governments upon which a whole series of matters hinge, some of which are within the President's exclusive power and some of which are in Congress' power, then once this comprehensive relationship is negotiated and the foreign government with justification says to itself, this business of making this agreement subject to appropriations or subject to legislation is an internal matter of the U.S. Government; we have the U.S. Government's word. In these circumstances, Congress is really very, very seriously circumscribed in the exercise of its proper power.

I might add that I think that this also has the impact of impairing the leverage that the appropriations power has traditionally given the Congress. I question whether the appropriations power is any longer a really effective tool for the Congress to control these kinds of situations.

Senator ERVIN. I recall one time in the hearings before the Foreign Relations Committee and the Armed Services Committee, which jointly conducted hearings on the Tonkin Gulf Resolution that the Secretary of State appeared before the committee, and I asked him about the SEATO treaty. The SEATO treaty in effect declares that any obligation for us to use armed forces in respect to that area was subject to our constitutional processes.

Mr. SWAN. Right.

Senator ERVIN. And I took the position that I could find nothing in the SEATO treaty that obligated us to engage in combat in Southeast Asia without congressional approval. Well, the Secretary of State said that President Kennedy had written certain letters and made certain statements, and President Eisenhower and others had made commitments. This is nothing in the world but an assertion, as I construed it to be, that they possessed inherent powers to do those things, notwithstanding the express words of the SEATO treaty and the express words of the Constitution.

Mr. SWAN. Precisely. There are two things that have happened here, which are interesting. One is that some of these powers are allegedly derived from the President's position as Commander-in-Chief. The Senate has gone through a long period of reviewing this argument and we can set it aside. The other thing is that the Senate has lost the control of these mutual security treaties that it thought it had. The Senator will recall the NATO hearings, where Senator Vandenburg was very insistent that a provision requiring compliance with constitutional procedures be included in the treaty. This indicates unequivocally that there was no expectation on the part of the Senate at that time that they were giving license to the President to more troops, and then to build a whole series of commitments, formal and informal with respect to what the United States would

do under the broad treaty guarantees. Essentially the Executive has created a worldwide structure of commitments far beyond what the legislature thought it was doing initially.

Senator ERVIN. I think you do exceedingly fine in pointing out the fact that this whole question involves four different categories of agreements, and that there seems to be no doubt under the Constitution in certain areas—such as where the President is acting as Commander-in-Chief of the Armed Forces, and where he is acting and receiving ambassadors under that provision—that he has some powers that are his alone.

Mr. SWAN. Precisely, Senator.

Senator ERVIN. But is it not true, in your opinion, that the great majority of the dealings with foreign countries of a substantial nature require the exercise of a shared power; that is, the power which is shared by the President as the mouthpiece of the country, and by the Congress in general, and by the Senate in particular?

Mr. SWAN. Precisely, Senator. Let me put it this way. The President has the recognition power. He has the housekeeping functions that relate to the conduct of our diplomacy. I personally concur in the line drawn in the recent War Powers Act, between the President's powers as Commander-in-Chief, and the war powers of the Congress. If you take this then as a rough list of the basic presidential powers, you find that they really cover a fairly restricted area. The vast number of subjects on which we deal with foreign countries are explicitly provided for in the grants to Congress; our commerce, our wars, and virtually every subject in which we have some dealings with foreign countries are reflected in the provisions of article I. Thus Presidents have had to construct the inherent theory in order to be able to handle these matters on their own.

So, I concur, that the power to make agreements on most of the subjects on which we have dealings with foreign countries is a shared power.

Senator ERVIN. There is no doubt, as far as the Constitution is concerned, that any Executive agreement would require the expenditure of public funds by the United States and is something which is clearly within the control of the appropriations power of Congress.

Mr. SWAN. I would hope so.

Senator ERVIN. I think that you have a most excellent statement. I don't remember having seen a finer statement on this subject. I am very much impressed by what you state on page 13, in the second to the last sentence in the second paragraph, "For it is precisely when it becomes inexpedient for one branch of government to respect the bounds of its authority, that the Constitution speaks loudest, or there is no purpose in it." I think that is an absolutely accurate statement, and also I would say the finest of any that I have heard or read on the subject.

Mr. SWAN. Well, thank you, Senator.

Senator ERVIN. It is in complete harmony with George Washington's Farewell Address where he points out that the Constitution provided for separated powers of the Government between the three departments, and he made the very significant statement that it was

just as necessary to preserve this distribution of powers as it was to have created them in the first place.

Mr. SWAN. I agree.

Senator ERVIN. One of the great things in the Constitution is that normally each department of government is supposed to take its one domain and protect it against encroachment on the part of the others. The Congress has not shown a very strong disposition in recent years to protect its domain for several reasons. In the first place, I think—and I hate to say this—a lot of members of Congress are perfectly willing for some troublesome problems to be decided by the President rather than for them to assume the responsibility especially political responsibility of so doing. And then party government being what it is, so many members of the Congress are members of the party which controls the White House at a particular moment, and they think from a political standpoint that it is more important to protect the White House action and to sanction it, no matter what it is, than to take the side of the Constitution on which our Government rests.

Mr. SWAN. Yes, sir. These are difficult matters. I do not have a great deal of wisdom on how one goes about getting Congress to organize itself for the assertion of its responsibilities. This is really one of the most critical things.

There is one matter, on which I did not say too much in my statement, but which I think is terribly serious. This is the propensity of the Congress, particularly in recent years, to extend to the Executive vast discretionary authorities under legislation. There is no constitutional question here, but when one sits down with the legislation on foreign relations of the United States—just a simple committee print that the Foreign Relations Committee puts out—and traces through the authorities that the President has, it is an enormous amount of delegated responsibility that the Congress has given to him. There are many, many instances, where I believe it would be quite possible for Congress to constrict its delegation without impairing the effectiveness of our foreign relations.

Senator ERVIN. Yes, I think you placed your hand on one of the deficiencies in the actual operations of our Government during recent years. Congress is entirely too liberal, in my judgment, in enacting legislation in which it delegates to the President powers which ought to be far more specifically defined than they are by a broad congressional act. And, of course, as you point out in your statement and in your oral testimony, there is no constitutional question there because the Congress has authorized the President to take these steps. Therefore, no question of separation of powers is involved as far as the Constitution is concerned.

Mr. SWAN. In a larger sense, there is a separation of powers issue. What has happened is that because of these delegations there has been a shift in the laws of power so that when Congress really does want to exercise a veto, or does want to exercise its judgment on a particular matter, it finds itself behind the eight ball, if I may use the colloquial phrase.

Senator ERVIN. As a lawyer, I not only have trouble with the doctrine of inherent power in the Presidency, because of the very use of

my understanding of what Executive means, but it also seems to me that Hamilton's defense of broad powers by the President is inconsistent with the very simple rule of interpretation that where you have a general grant of power, and then you have a specific provision, that the general should yield to the specific.

Mr. SWAN. That is right.

Senator ERVIN. It seems to me that in construing the Constitution, and particularly in construing article II which says that the President should have the "executive power," that a proper method of interpretation requires that the other provisions of article II which say what the framers meant by the Executive power, what they intended to give him by their expression, in other words, as a specific grant of power.

Mr. SWAN. Well, I quite agree.

Senator ERVIN. And, therefore, it limits the general grant of the power.

Mr. SWAN. I agree. Justice Jackson in a section of his *Steel Seizure* case opinion that I did not quote, makes precisely the point that there could be no purpose in the remaining specifications of article II if, in fact, the first clause did the job. In light of this, the broad statements contained in some parts of the opinion in the Meyers case on the removal of power, should not be interpreted as giving judicial sanction to the notion that the Executive power clause is a conference of power on the President.

Senator ERVIN. I am sometimes accused of being a strict constructionist of the Constitution, but I do not believe I deserve that praise—or that criticism—because my position always is that when the Constitution makes a grant of power, that the provision granting that power should be liberally construed to effect any objective which was within the limits of the power, and to make the power effective. It seems to me that this theory of inherent power of the Presidency is absolutely inconsistent with the whole objective that the people had in ratifying the Constitution, and is absolutely inconsistent with the written Constitution.

Mr. SWAN. I would add a note to that, sir. I think we have to recognize that the Office of the Presidency has evolved substantially through the years and quite properly so. Also we have a different set of problems to handle. The Presidency as a political institution has changed. The Presidency as a participant in the legislative process has changed. But, it is precisely because the Presidential office has evolved in ways quite different perhaps from that envisioned specifically by the framers, that the fundamental proposition of the separation of powers, and the necessity for constraints on this new Presidential office, become even more important if we are going to preserve the very liberties that the Constitution was chiefly intended to preserve. So, far from the argument of expediency being in favor of giving the President vast authorities, expediency may argue for limiting the power of the President.

Senator ERVIN. Well, I certainly agree with you.

Professor Miller, have you any questions?

Professor MILLER. Just one or two. Senator. Thank you. I was impressed indeed with Professor Swan's statement.

The subcommittee heard testimony a couple of weeks ago from Prof. John N. Moore of the University of Virginia to the effect that S. 3475 would be both unconstitutional and unwise. Now, without going deeply into the question, I take it that in general you agree that perhaps there is wisdom in this proposal?

Mr. SWAN. Yes.

Professor MILLER. Now, on the constitutionality, do you see any constitutional impediment to such a bill, or to something similar?

Mr. SWAN. Yes, there are several provisions in here I think would have to be changed to avoid a constitutional challenge. I think that if the right changes are made, and if the right kind of language can be developed, the problems can be avoided.

Professor MILLER. You see it as what type of constitutional problem?

Mr. SWAN. Well, there are several points. First, the bill purports to cover every executive agreement. I think that it would be difficult to sustain the constitutionality of a 60-day waiting period, if the agreement were within the exclusive powers of the President. If, for example, he were making an agreement extending *de jure* recognition to a foreign government, I think it would be extremely difficult to sustain the right of the Congress to put a waiting period of 60 days on his independent determination as to when the agreement should go into force. That is one defect I see in it.

There is another problem raised by the bill's failure to make an exception for agreements made pursuant to prior congressional authorization. The executive branch has on numerous occasions taken the position, and this is a dubious argument, that once Congress has given a delegation to the President, it may not withdraw that delegation in order to act on specific cases within the broad framework.

Professor MILLER. Let me interrupt you for a moment. There is a practice, that is fairly often used, of laying before the Legislature certain administrative actions.

Mr. SWAN. Yes, sir.

Professor MILLER. Would this not be analogous to that?

Mr. SWAN. If I may call to your attention, there have been at least four occasions that I know of, which though somewhat distinguishable from the bill, have elicited a claim by the executive branch that such provisions are unconstitutional.

Professor MILLER. But, there is no Supreme Court statement.

Mr. SWAN. No, no.

Professor MILLER. The President's lawyers said that they were unconstitutional?

Mr. SWAN. Yes. However, I am not sure it would be wise for the Congress to take on this question in this kind of legislation. I say this, not for technical reasons, but because I think that the problem of executive agreements made on legislative authority is not really a subject to which this bill should address itself.

Professor MILLER. Well, I take it there is an analogy at least on settling the constitutional question of whether the President must respond to this laying before Congress or coming to agreement provision?

Mr. SWAN. Right.

Professor MILLER. I think that it is worthwhile exploring with you just a little bit your point that there is a certain area where the Presi-

dent has exclusive power—inherent or whatever label you want to put on it. It should, it seems to me, have to be fairly carefully defined. I wonder if you have any thoughts on how to box that particular animal in?

Mr. SWAN. Well, that is a difficult one. I have toyed with the issue. I do not think it would be wise for the bill to acknowledge explicitly that the Executive has an area of exclusive power. The reason is that action under the bill must be initiated down in the State Department when they decide what to send up. In making this decision, they will give any such reference, if cast in the form of an exception the broadest possible interpretation. They will do their best to emasculate the bill. However, reference to the powers of Congress might do it. That is, any executive agreement touching upon a subject within the powers of the Congress would be the subject of the 60 days waiting period; something along that line. As I say, I understand this is a very difficult problem, and I would think that the way to approach it is by an affirmation of Congress's authority rather than an effort to box out the Presidential authority.

Professor MILLER. Do you think it would be invalid for Congress to act upon, say, the recognition of Mainland China by the President?

Mr. SWAN. If the subject of agreement with Mainland China was limited exclusively to the extension of *de jure* recognition to that government, I think we have to say that it was within the President's exclusive power.

Professor MILLER. Why?

Mr. Swan. Pardon me?

Professor MILLER. Why?

Mr. SWAN. Because the precedents on this, I think, are fairly good. They start out with the debates over the citizen Genet affair, and come on forward with several Supreme Court opinions not directly on point, but suggest that it is based on the President's power to receive ambassadors. Of all the subjects which might be carved out as within an exclusive Presidential domain, this is the one that I think seems to be most firmly established.

Professor MILLER. What about the settlement of claims attendant to recognition?

Mr. SWAN. Well, we have the *Pink* and *Belmont* cases. To the extent that the terms of the settlement begin to impair private rights, we do not know just how far the President can go. But this is because the agreement must be consonate with the Constitution.

Professor MILLER. How far can the Congress go to require a settlement agreement be laid before it?

Mr. SWAN. I would consider this an area of concurrent authority. If Congress chose to pass on a claim of this nature, I would not include it within the exclusive domain of the President.

Professor MILLER. I think in sum, then, that you see a very, very narrow area of exclusive powers of the President.

Mr. SWAN. Certainly.

Professor MILLER. I have just one other question, if I might sir. There is, I am sure, going to be testimony when the hearings resume, and we have already had some testimony, with regard to the policy implications—that this would be an undue interference with the con-

duct of foreign relations, and as a result of the need for speed and the Congress should not get in but should trust the Executive, because as the director of the CIA put it in a speech a few months ago, "We too are honorable people in the executive, and you should trust us."

Mr. SWAN. Indeed, we should always trust people. What I do not know is whether we should trust people, just because they are honorable.

Two things occur to me. It is not at all certain, that experience in dealing with problems of foreign relations, particularly fast-moving, fluid kinds of crises situations, shows that it is impossible to have shared congressional-executive decisionmaking. First of all, the Congress can deliberate rapidly and has done so. Second of all, the committee mechanism of the Congress is quite capable in many instances of working rapidly, very rapidly indeed. So if speed is the question, it is not at all clear to me that it is much of an argument.

There is another dimension to this. No President, as I would understand it, comes to a new crises, a fast-moving situation, without background. He comes to it with contingency planning, with intelligence assessments, with a whole framework within which he works. It would strike me as quite possible, if we had the will to do it, for the same kind of mechanism, this framework, to be provided to the appropriate committees of the Congress, and through them to the Congress as a whole, so that the Congress could react very rapidly, very intelligently, and very receptively to problems as they emerge. Indeed, this has occurred in the past. Also, I would suggest that it is often when individual Members of Congress or committees of the Congress are at policy loggerheads with the President, that Presidents begin to say that you have got to trust us. I am never quite sure whether the issue is one of mechanics or policy disagreement.

Professor MILLER. I have nothing further, Senator.

Thank you, sir.

Senator ERVIN. As I take it, you think that it would be a better approach to this problem to require the filing of any executive agreement with the Congress which had a relation to the powers vested in the Congress by the Constitution?

Mr. SWAN. Yes, sir. If that can be done without giving away too much.

Senator ERVIN. Yes.

Mr. SWAN. The problem here is the residual power. I assert that the residual power on any subject not specifically given to the President, lies with the Congress. And I would not want to see language so specifically tied to the subjects enumerated in article I as to implicitly give away this residual power.

Senator ERVIN. I certainly agree with you in your opinions that in any instance where the Constitution places the exclusive power in the President to make an executive agreement, Congress does not have any power to nullify that executive agreement. This bill is very broadly drawn. Of course, we drew it as a blueprint for discussion without committing ourselves to the proposition that it was ready to strike full blown, as Minerva did from the brain of Jupiter. I hope

that you will amplify your suggestions in your letter to me about the proposed changes. It would be very helpful to us.

Mr. SWAN. I will be delighted to do so, Senator.

Mr. EDMISTEN. Professor Swan, I have one question. Do you think it would be going too far in this bill to allow one House of Congress to disapprove it? As you have pointed out, only the Senate is given a participation in treatymaking. Would it be going too far to allow either House of Congress to disapprove an executive agreement if it was to find, according to your definition, that the agreement impinges upon a congressional function?

Mr. SWAN. I think it would go too far. What we are doing here is asserting the basic legislative power; the right of the legislative to control the exercise by the President of his responsibility for negotiating agreements. I think that has to be done by the full legislature.

Mr. EDMISTEN. As it stands right now, though, is it not true that the Congress really does not have much to do with the field of foreign relations such as with the Azores and Bahrain agreements? There is nothing much really that Congress can do short of the appropriations route, and as Senator Ervin has pointed out on many occasions, they loathe to do that. So, the Congress does not have much of a role right now in foreign relations, does it?

Mr. SWAN. No, I think it is a very critical matter, to which you are addressing yourself. It is terribly important that the executive make clear to foreign governments that when they have come to an agreement with our representatives, that may not necessarily represent an agreement with the United States.

Mr. MILLER. May I ask one more question, Senator?

Senator ERVIN. Yes.

Mr. MILLER. The subcommittee has heard testimony about the President's power as commander in chief. You spoke about the Spanish agreement, and the Portugese agreement has been mentioned, and so on. Do you see this as an independent, exclusive power by which he could commit the United States to station troops and so on? This would be outside of the exclusive area, would it not?

Mr. SWAN. This would clearly be outside the exclusive area.

Mr. MILLER. Thank you, sir.

Senator ERVIN. Well, I want to thank you for your written statement and your oral statement, because I would say they deal with this from a historical standpoint, and also from the standpoint of the governmental philosophy, and also from the practical standpoint. We are indebted to you for your great contribution to this study.

Mr. SWAN. Senator, it has been my privilege, and I thank the committee very much.

Senator ERVIN. Will counsel call the next witness?

Mr. EDMISTEN. Mr. Chairman, the next witness is a North Carolinian, Prof. William E. Jackson, of the Department of Political Science, Davidson College.

Senator ERVIN. I am delighted to welcome you to the committee, and I might wish to thank you on behalf of the committee for your willingness to appear and give us the benefit of your views in a field in which you have made profound studies.

STATEMENT OF WILLIAM E. JACKSON, JR., ASSISTANT PROFESSOR,
DEPARTMENT OF POLITICAL SCIENCE, DAVIDSON COLLEGE

Mr. JACKSON. Thank you, Senator. Let me say two things at the outset. First of all, I am delighted that Davidson College recently awarded you an honorary degree, and I think that it was in large part because of your defense of limited constitutional government in this country. Secondly, I remember, and I think you may recall, the two or three students that came down front while you were being awarded the degree. I think you would be the first man in this Government, the first man to defend their right to protest, and I reminded some of them of that later on.

Senator ERVIN. Thank you. And I might state that one of those students I saw later, and he said, "I hope we didn't disturb you too much in what we did." And I said, "No"—I said, "I have been fighting for your right to do that very thing."

Mr. JACKSON. A number of us would. Also, I would like to thank very much the staff, Mrs. Moore, and Mrs. Butler, and Mr. Edmisten, for the courtesies that they have extended to me.

Senator Ervin, I appreciate the opportunity to appear before this subcommittee at this particular time in American history. I interpret these hearings as an attempt to keep our heads while others are losing theirs. The hearings, it seems to me, are an act of Lockean faith in the short run and in the long run, I believe, will contribute to a more proportionate, less dangerous balance between Congress and the Chief Executive.

When you give your name to a series of investigations of executive encroachments on legislative responsibilities, Senator Ervin, this fact alone serves to alert the people of this country to the reality that something is amiss in Washington. This is the great educational benefit of the work of this subcommittee and the Subcommittee on Constitutional Rights, and of the vigilant efforts of the Senate Committee on Foreign Relations and the House Government Operations Subcommittee on Freedom of Information.

We must persist in acting upon our belief, in the Congress and in the country, founded on the thoughts of the Founding Fathers, that there is no place for an "emperor" in this American system. Because we know the value of what was created by the Constitution—a constitutional, Federal republic with limited powers vested in the Federal Government and distributed among its branches—we must never give in to that which Presidential acts of recent years, by Presidents Johnson and Nixon in particular, would impose upon us: a system in which—to borrow Tom Wicker's words: "It lies within the sole province of one man, unlimited by law or opinion, whether elected by landslide or hair's breadth, to decide without let or hindrance" how the foreign relations of this country are to be conducted and the military power of the United States used in the world.

These hearings must be seen in the context of the times in order to appreciate their importance. In my opinion, you are engaged in the most serious constitutional contest in this century.

Presidents today tend, as Shakespeare said of Caesar, to "bestride the narrow world like a Colossus." Merlo Pusey, in his excellent

little book, "The Way We Go To War" details Presidential freedom of action. The President enters into international agreements and commitments on his own or, at his discretion, enlarges the commitments made by treaty with the advice and consent of the Senate. He determines when the United States shall go to war, how the war shall be carried on, and whether it shall be extended to other countries. (In 2 years, since May of 1970, the Commander in Chief has invaded two countries and bombed four in order—we are told—to withdraw from one.) Of course, the President also exercises great influence over what the people at home must do to support our foreign entanglements. And what is there, Senator, to prevent a President obsessed by the righteousness of his own cause, or his own peculiar concept of face and honor, from holding down the accelerator until a nuclear holocaust is unavoidable?

The Founding Fathers, as you know, recognized the impossibility of assuring the wise exercise of power by any one man or institution when they divided power among many men and several institutions and, in doing so, limited the freedom of any one to impose tyranny or disaster on this country. But the postwar accretion of power in the White House over matters of war and peace has encouraged Presidents to develop a cult designed to justify any act in foreign relations and any use of our Armed Forces.

Congressmen, journalists, and—I regret to say—political scientists have at times served this cause. We help to spread the "Superman in the White House" cult every time we concede to him superior information and wisdom, rather than expending our energies on seeking out other sources of information as a basis for independent judgments. Further, we escape from responsibility.

Of course, I realize that there is no way for Congress to legislate wisdom and restraint in the minds of those who serve as President. Senator Javits has wisely written in *Foreign Affairs* that "the first prerequisite for the best functioning of our constitutional system in foreign policy is a knowledgeable and sensitive President who wants to cooperate with the Congress in foreign policy." We have to hope that in the future the American people will find leaders who have more respect for the checks and balances of a constitutional system.

But Congress can attempt to change some of the ground rules—however gradually—and over time to educate the people on the necessity of a separation of powers (or separated institutions sharing powers) and respect for the exercise of separate powers.

Thus, we come to your bill, Senator, S. 3475.

As you know, I am a political scientist specializing in American national government, not a constitutional or international law expert.

One of the virtues of the Senator's bill is that it does not deal with the theoretical and legal problems in making distinctions between presidential agreements, joint congressional executive actions, and the treaty process. In other words, the bill does not undertake to resolve fundamental questions relating to the treaty power of the Senate.

This bill, as does Senator Case's, deals with a immediate live issue: the withholding of information about the foreign entanglements of the United States and the consequent denial of a congress-

sional voice. You are asserting that Congress, at least, has the right to know in its collective capacity as the elected 535 representatives of the people. You are recognizing that numerous secret and contemporary executive agreements have been negotiated by the Executive without any congressional knowledge whatsoever—despite section 112A of title I of the U.S. Code which requires the Secretary of State to compile and publish all international agreements other than treaties concluded by the United States during each calendar year. As you know, the Symington subcommittee hearings along stand as a monument of evidence of such agreements withheld from Congress.

So S. 3475 deals with a practical political problem. And I applaud its objectives. However, I am not certain of what its effects will be if it becomes law. Senator Case's bill, S. 596, approved by a vote of 81 to 0 in the Senate in February, requires all new international agreements to be sent to Congress for its information. As I understand the bill, it leaves Congress and its committees free to act on this information in any way that the Members of the House and the Senate see fit.

And your bill, Senator Ervin, goes further in certain respects by empowering Congress to veto any executive agreement within 60 days of its transmittal, if a majority of both Houses voted against it. What I like about this bill is that it does provide the means for Congress to say "No" by concurrent resolution—no veto being possible—to secret arrangements entered into by the President with a foreign country.

What gives me pause about the bill, Senator, is the trap in which it can catch the House and the Senate. If both bodies do not act by concurrent resolution within 60 days, then the President can claim congressional acquiescence or authority for what he has done. I strongly agree with Senator Fulbright's idea of empowering either the House or the Senate to reject an executive agreement.

Finally, given the continuing tendency of the House to be a doormat for the Executive in foreign affairs, this bill could be a way for the White House to get blanket approval for Congress for whatever it chooses to do in binding this country bilaterally and multilaterally in foreign relations.

I would stress the bills virtues, however, in that it has the potential for exposing the Executive and for saying "No" to questionable entanglements without the threat of a veto.

If I may suggest, an interesting exercise for the committee staff would be to catalog all Presidential acts and statements in recent months that seem to commit the United States within the meaning of S. 3475. Some examples: (1) Military plans recently approved by the Joints Chiefs of Staff and relayed to Caribbean naval commanders, entitled "Special Rules for Engagement for the Caribbean," which authorized the Navy to use force to protect merchant ships threatened by Castro's gunboats. If a Cuban attack continued, U.S. commanders could continue interposing until further Cuban aggression creates a situation of self-defense for U.S. forces. (2) Various prospective agreements which have been talked about in the press, between the United States and the Soviet Union, e.g., a grain deal

and a joint Soviet-American space mission. And a lend-lease settlement. (3) New canal agreements between Panama and the United States which I understand we have under negotiation at the present time. (4) Convention outlawing biological weapons signed by the United States and subject to ratification. (5) Reported U.S. agreement to sell F-5 jet fighter planes to Jordan. The headlines said a U.S. agreement. (6) Recent talks between the Turkish Government and our Government about a plan for the modernization of the Turkish Army and Air Force. And so on.

Senator, I would like to conclude with some very candid thought about Congress' responsibilities and shortcomings in the face of Executive dominance. You commented on some shortcomings a little while ago.

Earlier I stated that what you are doing here is an act of faith. Even if the Senate and the somnambulant House were to pass this legislation, I believe the White House would veto it in the present climate. Even if the Members of the Senate and the House were to use that gut power of the purse Congress is supposed to have, and cut off funds for the Vietnam war, or deny funds for the implementation of the Portugal and Bahrain agreements unless these agreements are submitted as a treaty, I believe nevertheless the White House would veto the legislation. And if Congress were to pass it over Presidential veto, Senator, I believe the present President would commandeer funds in the Treasury to pursue his goals. I do not say this lightly.

Lawlessness reigns in the White House. Can there be any doubt of this? From where does the President get his authority to take the military actions of this week? Not from Congress. The Gulf of Tonkin resolution was repealed in January 1971. Not from the Constitution, as I read it. How far can the commander in chief clause be stretched and the rationalization of protecting American troops be employed?

Surely the President is not above the law; he is not free in foreign relations to disobey the law or ignore the Constitution. *Pacta sunt servanda*, the international lawyers say. The law must be obeyed.

The test of devotion to law is not how people behave when it goes their way, as Senator Fulbright recently wrote in the *New Yorker*, but how they behave when it goes against them. During these times of internal dissension over the war in Vietnam, the leader in the White House is the first to point out—and correctly—that citizens have a duty to obey the law, however little they may like it.

Just this week, however, it has been revealed that the United States is financing and organizing a large expeditionary force of Thai soldiers in Laos despite Congress-made law, signed by the President, which prohibits U.S. funding of third country forces to support the Governments of Laos and Cambodia. Last year Congress passed a law which declared it to be the policy of the United States to bring to an end at the earliest practicable date all military operations in Indochina, subject only to the release of all American prisoners of war. Upon signing the measure on November 17, the President brashly declared that the wording was without binding force or

effect and it does not reflect my judgment about the way in which the war should be brought to an end. If this Mansfield amendment does turn out to be White House policy, it will be an accident and not the result of respect by the White House for Congress' view.

Recently, Senator, I started a file on examples of the administration breaking or bending the law. Your committee is very familiar with the impoundment of funds appropriated by Congress, with the misuse of the veto power, with the diverse ways the Executive may find money to do what it wants to do regardless. (See "The Billions in the White House Basement," Washington Monthly, January 1972.)

Here are some recent examples in foreign affairs gleaned from the press: (1) The administration's circumvention of the law barring all aid—except humanitarian—to Pakistan during the Bangladesh conflict. (2) The lack of even temporary compliance by the Executive with the ban on both military and economic aid to the Government of Greece in the foreign aid authorization bill for this fiscal year (let it be noted that Congress left the President an out in that legislation.) (3) The violation of the terms of the treaty to halt the spread of nuclear weapons by not complying with a provision requiring the halting of the supply of fissionable materials to four West European countries.

Numerous recent examples of Executive violation of laws relating to domestic matters could be cited, and you could do a better job of that than I can, Senator.

I regret that various representatives of Executive departments, Mr. Erickson from Justice, Mr. Buzhardt from Defense, Mr. Stevenson from State, could not be here today. It is always amazing to me how these house lawyers can continue to offer incredible yet smooth rationalizations to justify Executive violations and circumvention of Congress-made law. When they do appear, you may be sure that they will say: Let's settle this through nonlegislative means. We can work out some practical arrangements that will give Congress the information it needs. Don't be bought off by this carrot which is another ploy for placing Congress at their mercy. Just ask Senator Case about his experiences.

Senator, you recently stated before the Supreme Court that legislators are one of the most timid creatures I know and can easily be intimidated. How true. There is a growing body of opinion in this country that sees Congress in just this light vis-a-vis the White House.

Congress seems to be helpless in foreign relations. To put it harshly, how many armies does Congress have? This is not meant to be a flippant question. The raw power at the command of the President radiates into every relationship with that office. Power realities between institutions are inseparable from public conceptions of those institutions. Both are at the root of Congress' problem.

If you are not to continue to spin wheels, Senator Ervin, drastic action I submit is required to give any meaning to the word balance in congressional executive relations. Professor Bickel has urged court tests of constitutional powers. I heartily agree.

But more is needed. If you are not to be treated contemptuously by the White House, then the time has arrived to stall the legisla-

tive process and force an institutional showdown between the Senate and the President. I realize this is a drastic step, but it is needed to wake up the people of this country to Executive dictatorship. I do not use those terms lightly.

I propose simply, Senator, a legislative blockade. It takes 34 Senators willing to permit a filibuster—the same number it took to block civil rights legislation—against the processing of all major government business, for example, authorization and appropriation bills—until the President gives his public pledge to cease and desist from prosecution of a war for which he has no congressional or constitutional authority, or agrees to ask Congress for such authority.

Not to take this drastic step in protecting the war powers of Congress is to permit the continuation of legislative impotence and abdication in foreign relations, at least in the short run. They don't respect you very much at the other end of Pennsylvania Avenue, no matter what they say.

Once Congress has abdicated, we do not have a government of laws, but a government of men. Freedom is then in danger of being extinguished.

Thank you very much.

Senator ERVIN. I wish to thank you for a most interesting and informative statement.

You raise a very interesting point in stating that if this bill passes in its present form and not be vetoed successfully, that it would give the President many implied powers—that is, implied on his part—so that every executive agreement which is submitted to Congress, and which has not been repudiated by Congress within the 60-day period, would arguably constitute an express grant of power to him from the Congress.

Mr. JACKSON. Senator, I can see Mr. Stevenson or Mr. Erickson making that very point before this subcommittee sometime in the future.

Senator ERVIN. When the Supreme Court refuses to grant certiorari, the justices do not imply that they necessarily approve of the decision which is sought to be reviewed. But, it certainly has that effect for the time being at least.

Mr. JACKSON. And the public, I think, reads it that way.

Senator ERVIN. Now, there can be no doubt that during recent years congressional power not only in the field of foreign relations and in the field of war powers, but in virtually all other fields, has been sharply eroded by the delegation of power to the President by the Congress, by the failure of Congress to act, and in many cases by the assumption by the Executive of power which I do not think the Executive has. We had quite an illustration of that during the hearings on the Kleindienst nomination. The White House refused to allow a so-called Executive aide to come down to testify with respect to matters, which the administration had already made public by other witnesses, with respect to the aide's dealing with third persons. I certainly respect the right of the Executive insofar as executive privilege is confined to communications between presidential aides or other executive employees and the President, or with respect to communications of a confidential nature between different presidential aides or executive employees when they are assisting the

President in carrying out the duties of his office. But, I do not think there is any privilege that exists to withhold information about matters that have already been made public by other administration officials, or with respect to official dealings between presidential aides and third persons. That was the reason I raised the point that I would take the position of consenting to do nothing on the nomination unless a presidential aide, Peter Flannigan, came down and testified. I am glad to say that the White House at that point, at last, after much postponement, capitulated. Fortunately, the Congress, in that case, had a club to hold over the President. But in so many cases, Congress has no club that it can hold over the President insofar as seeking to get information.

MR. JACKSON. You had a big fish that they wanted, Senator, and I think you scared them a little bit. I do not know how you crack that nut of executive privilege. I read the other day that there are something over 2,000 employees on the White House staff now. Maybe about the only way you can get at it, and there would be a real howl and scream, is if the Appropriations Committees of the Congress very carefully specifically examine the monies being appropriated to be spent by the staff. That might conceivably throw the fear of God into them, although I can see the President saying that you cannot tamper with my immediate staff, and this is a pro forma thing, giving appropriations for my staff, and I will find ways to continue the operations of the White House Office, regardless of what you do in Congress. I really think the President would do that.

I cannot believe, Senator, what I have seen in this country in the last few years when it comes to disrespect for constitutional balance, or disrespect for the Congress, or disrespect for law on the part of our so-called leaders in the White House.

SENATOR ERVIN. Before we leave executive privilege, it seems to me from studying the philosophy and most of the historical precedents on both sides, that the sole objective of executive privilege is to protect the secrecy of communications within the executive branch of the Government. I think you can justify it because where you are trying to reach or establish a matter of policy, you want as free a discussion as possible. A person would be restrained from expressing his honest ideas if he thought that every fool notion he might advance in such a discussion would be in the headlines of the next day's papers. I recall when I became a member of the North Carolina Supreme Court, the chief justice, when we had our first conference, said to me:

We have a system here under which the newest member of the Court has to vote on each case first to keep him from being intimidated by those who have more experience. Now, you will have to vote first on all of the cases that we are considering at this conference. If you will give us the reasons for your vote, it will be helpful to us, because if your reasons are good, they would be helpful. If they are not very wise, there is no way to deal with a foolish notion quicker than to run it by somebody else who could take a swat at it.

I think that that is true about meetings within the executive branch of the Government that involve policy. Their secrecy ought to be respected.

But certainly when the matters have already been divulged to the general public, they no longer need to be kept secret. When they are

with third parties, certainly they ought not to be considered to be secret. That is just one indication of the theories that have been advanced for the first time in this Administration, or since I have been in Washington, that the mere fact that a man is classified as a Presidential aide, he is exempt from any obligation whatever to furnish any information whatever to the Congress.

Mr. JACKSON. Senator, I can see the President, himself, using executive privilege, and only himself using it to protect his confidential communications with his aides, such as a memo from Henry Kissinger, recommending certain options to the President. But, I cannot see the easy use of the executive privilege by the Secretary of State or any other Cabinet officer where they want to cover up some business in their department, or where they can cover up important internal planning documents. I cannot see this. For example, on the foreign aid program, the documents being denied the Senate in the Foreign Relations Committee. They want to know what the executive branch is projecting in foreign military aid for the next 5 years. I think the Foreign Relations Committee has a right to hear that.

Senator ERVIN. Well, I certainly agree with you on that, because when they ask for an authorization bill, that is a request on the part of the President for funds to carry out certain proposed activities. I think Congress has the right to know what those proposed activities are as a part of its power to determine whether or not the appropriation should be authorized or made.

Mr. JACKSON. Senator, what would you think about, if I may be so bold as to ask you a question, what would you think about Congress authorizing, let us say, a program of military aid to a foreign country, and appropriating the money, and then supposing Mr. Kissinger's staff, instead of AID, or instead of the State Department, or instead of ISA in Defense, supposing they then drew up some suggested changes in their program for the next year, they were the source of that. Should those documents from Kissinger's staff, and I am just speaking off the top of my head, should those documents of Kissinger's staff be subject to being seen by Congress?

Senator ERVIN. I think so. Unless Congress itself wishes to expressly exempt itself from receiving that information, I do not think the executive branch can make that determination.

Mr. JACKSON. I do not think there is any doubt in anybody's mind in Washington, anyway, that the Secretary of State is not the key foreign policy adviser to the President these days. He makes substantive foreign policy suggestions, and his staff makes suggestions about the programs of the State Department and the Defense Department and USIA, but I just do not know how you get at Mr. Kissinger.

Senator ERVIN. Well, that is a recent development in Washington. Until fairly recent times, the departments of Government carried out the policies of the Administration, and the Secretaries willingly came down and communicated with the Congress. But, we now have a system that has been gradually developing during recent years. I think that it became very strong during the Eisenhower Administration, and it accelerated during the Kennedy and Johnson Administrations and has reached its culmination in the present Administra-

tion. Today, most of the powers of government are exercised in the Executive Mansion by White House aides rather than by the heads of the departments.

MR. JACKSON. Why is it not possible to summon Mr. Kissinger, and then join the issue in court?

Senator ERVIN. You do not have the right to summons where he was involved in a communication with the President. Also, I think there is some limit on the power to elicit information about dealings with foreign countries while they are in the state of negotiations, because you might thwart the purpose of the negotiations. Certainly there are some things that all White House aides do that ought to be subject at least to the right of Congress to hear about what they are doing, especially when you get outside of the very narrow, specific area of communications between them and the President, or between them and other executive aides. I think the first exertion of executive privilege was made by George Washington in respect to the proposed treaty with the Indians, as with respect to his aide. He actually permitted Congress to see the documents that it was required to see, but that incident is still cited as the authority to withhold the documents, although he did not actually withhold them.

MR. JACKSON. As I recall, he did not have too happy a time when he went down to the Senate at one time.

Senator ERVIN. No. He came down to the Senate, having taken the words "advise and consent" to mean that he ought to get prior advice from the Senate. It was a very uncomfortable day for him. But, I think that illustrates that from the standpoint of negotiating a treaty or negotiating an executive agreement, that it is necessary in the nature of things that it be negotiated by the President. Of course, the Constitution requires a treaty, after being so negotiated, to be submitted to the Senate. I think that the Case bill, and this bill, certainly are recognition of the fact that after they are negotiated, that they ought to be submitted to the Congress for its consideration.

MR. JACKSON. How do you make accountable a man like the Director of OMB? I believe he is the highest Presidential appointment not subject to Senate confirmation, and I know his powers are vast. I remember watching in prior years these powers which were less impressive than they are today. It seems to me you have to make that official in that powerful position in some way accountable to the Congress.

Senator ERVIN. Well, certainly we gave him very vast powers, and many of us have misgivings on some of them.

Professor Miller.

MR. MILLER. Just a couple of questions, Senator, if I might. Would you agree, sir, that there is a shared power between the Congress and the President on foreign policy?

MR. JACKSON. Absolutely. I do not see how you could read the Constitution any other way.

MR. MILLER. All right, then. It requires, I take it, a high degree of cooperation. I suppose that you would agree with that also?

MR. JACKSON. And restraint, yes, sir.

MR. MILLER. Now, do you see any area of exclusive Presidential power that would not permit the Congress to take a look at any

agreements he entered into? You heard the previous witness testify that there might be some relatively small areas. Would you agree with his testimony?

Mr. JACKSON. Well, I think it is generally recognized, Professor Miller, that the powers of the President under the Commander in Chief clause, give him certain flexibilities and room for initiative in moving about the Armed Forces of the United States, once they are committed by congressional authorization, once they are committed to conflict. So, certainly I would think—I do not think Congress has any business, or the Senate has any business, giving day-to-day military orders to the President.

Mr. MILLER. Well, you did testify, did you not, about the President's reaction to a statement about the withdrawal and so on, and you questioned that, it seems to me.

Mr. JACKSON. I did.

Mr. MILLER. You said you were not in agreement with it. Now, I take it that is under his commander in Chief power, and Congress has no authority over him?

Mr. JACKSON. No, sir. I think the Congress can state its views of the foreign policy of this country. The President signed that statement into law as part of the Defense Procurement bill, of course, and I do not—I do not for a moment think that he has it solely within his authority to say, I disregard, and Congress can talk all it wants to, and state policy, but it is not my policy.

Mr. MILLER. What is the remedy you suggest? You have suggested a legislative blockade. Maybe it should be something a little less drastic.

Mr. JACKSON. Constant guerrilla warfare on the part of the Congress, continuing with hearings on bills such as Senator Fulbright's, Senator Case's, and Senator Ervin's bill, and—

Mr. MILLER. You see no judicial remedy?

Mr. JACKSON. I do not put much faith in the power of the Congress over the purse strings to control the Executive.

Mr. MILLER. No, no. In the courts? You see, I would put little faith in the power of the Supreme Court to balance these delicate problems between the Congress and the Executive.

Mr. JACKSON. Professor Miller, do you think that the court would touch such a hot constitutional issue?

Mr. MILLER. That is one reason why I think the courts are not a remedy. I do not see any specific remedy. I can see a broad legislative blockage, and that is an interesting thought, but a specific remedy for a specific problem on those executive agreements is what the committee is searching for. I was wondering if you had any thoughts along that line, other than the Senator's bill, of course, which I take it you would approve of in general?

Mr. JACKSON. Oh, yes, generally speaking I do, with the qualifications I made. Of course, the Congress could have a very active lawyer on its part, and I believe Senator Hartke and others proposed this in the past, and go to court and say that we know that there are certain outstanding executive agreements that we have not been informed about, yet we are being asked, or we will be asked, to appropriate money to implement these agreements. We are demand-

ing the Congress be informed under the Constitution. I suppose that is one tack than can be taken.

Mr. MILLER. Well, I think there are certain technical, legal difficulties there, without pursuing it. Senator, I think it would be useful for Professor Jackson to send a letter also on a specific remedy, as well as the general issue of executive agreements.

Senator ERVIN. I agree with you, and that would be very helpful to us if you would.

Mr. MILLER. I have one other question.

Mr. JACKSON. Either legislative or judicial?

Mr. MILLER. Well, I would say this, without getting into an argument over law, that I do not see any real role for the courts here. I think if Congress cannot settle its own problems, I do not think they should toss the ball down the street to the Supreme Court. They are not going to settle Congress's problems, it seems to me.

Senator ERVIN. Well, Senator Hartke's proposal was that Congress have the counsel of a constitutional counsel to present its intent to the courts, since so many congressional acts, especially those of major importance, are passed by a very ill-advised Congress. Some Senators raised the question that if the majority of Congress is entitled to have a counsel, then the minority ought to have one too. But, I would say this: there was raised quite a question a couple of years ago when the Comptroller General, who is the arm of the Congress, and who is empowered by act of Congress to deny the payment of an obligation which is contrary to the authority granted by Congress, made a ruling, and then the Attorney General made a diametrically opposite ruling. Congress, by reason that it depended upon the Attorney General to be the lawyer for the Government in the courts, was powerless to carry out its authority. So, I have introduced a bill that would provide that in this very restrictive field when there is a difference of opinion between the General Accounting Office and the Department of Justice with reference to the legality of the expenditure, that the General Accounting Office can secure its own attorney and litigate its question in the court if need be. Otherwise, Congress has no way in the world to enforce the decision of its own agency, the General Accounting Office. I think that this is one field in which Congress should authorize some form of independent counsel.

Mr. JACKSON. Well, of course, as you well know, Professor Miller, Senator Case tried when he heard about the Portugal and Bahrain Agreements, he tried by Senate resolution to have those submitted as treaties. He failed, and then he resorted to the power of the purse, and there he shall fail also, I feel certain. But, I mean, there is something that specifically has been done, a specific remedy that has been attempted on executive agreements.

Mr. MILLER. Well, I think that I only have one other question, Professor Jackson. I think this bothers me a bit because I am not quite sure that I understand if there is any precedent for it. On page 5 of your statement you mention that if the Congress were to pass a bill over a Presidential veto, that the President would commandeer funds from the Treasury. I am not sure I am aware of any actions by this President or previous Presidents in this regard. Do you have any instances? I know of reprogramming funds, for exam-

ple, which is done for the Department of Defense, but that is within the DOD budget. But, I am not aware of a commandeering, and that sort of hits me in the eye.

Mr. JACKSON. Well, Professor, there is an interesting article in the January issue of the "Washington Monthly" which details numerous ways that have been used by the Executive over time to find money for things it wanted to do regardless of what Congress may have said. Now, yes; I think, Mr. Miller, I do think that if such happened, that in the present circumstances the present Executive would indeed.

Mr. MILLER. Well, is there not a remedy, Professor Jackson? Doesn't the General Accounting Office disallow expenditures if they are not made in accordance with statutes, and does not the Congress have that remedy?

Mr. JACKSON. That is a remedy only if it is enforced, and only if it is upheld by the judicial authorities.

Mr. MILLER. Well, the Comptroller General has authority to do it on his own power, and he has a 15-year appointment and is not subject to Presidential appointment.

Now, I just wanted to mention this, and I say it with deference, that it is a little difficult to go along with the strong language of that type, and I think while reprograming does take place, then Congress does have a remedy of some type on expenditures of funds already existing. The GAO can disallow disbursements, and the financial officer is personally liable if he pays against a disallowance, and so on, so this is possible now. I simply mention it only because I think the language is too strong.

Mr. JACKSON. I see your point, professor, but I would stress what you said, it can, and right now, in Thailand, if I am not mistaken, the funds are being used from the budget of one department by another department.¹ The Defense Department funds are actually being expended by the CIA. Where does it get the authority to do that? Where is the GAO? How is it possible? That is what was revealed earlier this week, but, of course, we knew about it from rumors some months prior to this.

Mr. MILLER. Thank you, sir. I have nothing further, Senator.

Senator ERVIN. Thank you very much. We certainly appreciate your help and would appreciate a letter from you stating what specific changes you think ought to be made in this particular piece of legislation.

Mr. JACKSON. All right, sir. I will be glad to do that. Thank you Senator, and Mr. Miller.

Senator ERVIN. Thank you all very much. The subcommittee will stand in recess until Thursday of next week, May 18.

(Whereupon, at 12:10 p.m., the hearing was recessed to reconvene on Thursday, May 18, at 10 a.m.)

BIOGRAPHICAL INFORMATION—WILLIAM ELIAS JACKSON, JR.

Background.—Born at West End (Moore County), North Carolina, September 21, 1935. Married Judith Ann Fletcher of Union Grove, N.C. on August 15, 1964. 1 child, Elizabeth.

¹ As another example, see "Kennedy Asserts Laos Civil Funds Still Go to C.I.A.," New York Times. March 19, 1972, p. 1.

Education.—Received the A.B. degree in economics and political science at Davidson College in 1957 and the A.M. degree in international affairs and American government at the University of North Carolina, Chapel Hill, in 1959. The M.A. thesis entitled "Disarmament and Security," was an examination of the relationship between U.S. arms control policy and U.S. defense policy, 1955–1958.

Entered Columbia University through the Russian Institute in September, 1959; later switched to an American government major (with a minor in Soviet and Chinese political institutions) in the Public Law and Government Department. Departed Columbia for several years, beginning in 1961 (see employment record); Ph.D. dissertation not completed.

Employment.—Held a departmental assistantship in the Department of Political Science, U.N.C.-Chapel Hill, 1957–59.

Worked as full-time research assistant to Dr. Samuel P. Huntington, director of the Institute of War and Peace Studies (Columbia University), 1960–1961, 1962–1963. Assisted in researching *The Common Defense: Strategic Programs in National Politics* (1961); *Political Power, USA/USSR* (1964); and *Changing Patterns of Military Politics*, *International Yearbook of Political Behavior Research* (1962).

Ford Foundation Senate Intern, 1961–1962, serving full-time on the staff of the Majority Leader of the New York State Senate, Albany.

Budget Examiner, International Division, Bureau of the Budget, Executive Office of the President, 1963–64. Worked on military aid and military sales programs.

Taught American and comparative government as an Instructor in Political Science at the University of North Carolina at Charlotte, 1964–1965 (1½ years).

Assistant Professor of Political Science, Davidson College, 1968. . . . Courses in American national government and Soviet and Chinese political institutions.

PUBLICATION OF NOTE

1. William E. Jackson, Jr., "Defense: The Missile Nobody Needs," *The New Republic*, Oct. 28, 1967.

2. Jon W. Fuller and William E. Jackson, Jr., "Striking the Tripolar Balance," *Christianity and Crisis*, April 28, 1969.

3. William E. Jackson, Jr., Statement submitted to the Subcommittee on Separation of Powers, *Hearings on Executive Privilege* (Washington: GPO 1791), pp. 515–520.

**S. 3475—TO HELP PRESERVE THE SEPARATION OF
POWERS AND TO FURTHER THE CONSTITUTIONAL
PREROGATIVES OF CONGRESS BY PROVIDING FOR
CONGRESSIONAL REVIEW OF EXECUTIVE AGREE-
MENTS**

THURSDAY, MAY 18, 1972

**U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.**

The subcommittee met, pursuant to recess, at 10:30 a.m., in room 1318, New Senate Office Building, Senator Sam J. Ervin (chairman of the subcommittee) presiding.

Present: Senators Ervin (presiding) and Gurney.

Also present: Rufus Edmisten, chief counsel and staff director; Joel M. Abramson, minority counsel; Walker F. Nolan, Jr., assistant counsel; Philip B. Kurland, chief consultant.

Senator ERVIN. The subcommittee will come to order. First I must apologize for being late. I have been out of Washington for 2 or 3 days.

Counsel will call the first witness.

Mr. EDMISTEN. Mr. Chairman, the subcommittee will hear from Hon. Nicholas deB. Katzenbach, former Attorney General and former Undersecretary of State.

**STATEMENT OF HON. NICHOLAS deB. KATZENBACH, FORMER
ATTORNEY GENERAL AND FORMER UNDERSECRETARY OF
STATE**

Senator ERVIN. We are delighted to welcome you back to the city. The subcommittee appreciates your willingness to come far more than I can say.

Mr. KATZENBACH. Thank you very much, Mr. Chairman. It is always a great privilege to testify before you when you are in the Chair.

I have a prepared statement. It is not a very long one. Shall I run through it?

I appreciate the invitation of the committee to testify today and to give you my views on the subject of executive agreement versus the treaty-making power.

The fundamental problem, of course, is to work out acceptable and workable rules for the Executive and Congress in the formula-

tion and implementation of our foreign policy. That is not an easy job, as the Founding Fathers knew, and as we periodically rediscover.

This committee has already heard from a number of eminent constitutional scholars and I believe that there is really very little from a formal constitutional viewpoint that I can add to what they have already said. Executive agreements and treaties are largely interchangeable devices for conducting our international relations whether viewed from the perspective of international or constitutional law. The questions which can arise from a constitutional perspective center around the authority granted to the President to enter into a particular executive agreement pursuant to legislation or to his constitutional authority. Legislative authority may be in the form of a prior authorization, as is normally the case, or simply through enactment of necessary implementing legislation.

I do not think it particularly significant from a constitutional view point whether a binding international agreement is ratified by two-thirds of the Senate or authorized or approved by a majority of both houses of the Congress. Certainly our history is replete with both methods. While the word treaty suggests a certain degree of solemnity that perhaps the word agreement does not, one would be hard put to make a distinction on the basis of the importance of the undertaking. My reading of our own constitutional history is that documents called treaties are normally sent for ratification by two-thirds of the Senate, and documents without that label are not. And it is also worth observing that today most treaties are not regarded as self-executing, so that not only is two-thirds of the Senate involved, but a majority of both houses is involved in enacting the necessary legislation.

From both a constitutional and a practical political viewpoint it is important that the President and the Congress pull together on the fundamentals of our foreign policy. If the divisions within the Constitution have been, as my old mentor, Professor Corwin believed, an invitation to struggle between the branches of Government, they have equally provided the incentive to come into agreement, because without that agreement no effective foreign policy is possible. As the Chairman has noted, the separation of powers was designed to prevent autocratic decision and force consensus. That seems to me sound enough, and, indeed, I think that is the way in which it has generally worked.

I recognize that what I have said is not everyone's perception, and that it is difficult for me certainly, and must be difficult for this committee, to view the problem dispassionately. We are, after all, deeply divided in this country at this moment of history with respect to our foreign policy. We have been fighting for many years, a war in Southeast Asia, which has become increasingly unpopular at home—a war in which a majority of Americans wish we could never become involved, and a war which a substantial number of Senators and Representatives do not support. I am not sure that these circumstances are conducive to calm thinking or rational constitutional expression on the part of either the Executive or the Congress.

There is today a good deal of feeling on the part of the Congress that since World War II the Executive has played a greater and greater role in foreign policy and the Congress a lesser and lesser one. There is now a desire, which I think this hearing reflects, to restore some constitutional balance. The Congress wished to reassert its prerogatives and, at least to a degree, the Executive seems to be opposed to and fighting this effort.

I think there is a considerable truth to the proposition that the congressional role has declined and the Executive role increased. I am not sure that this is necessarily a bad thing, or that it is not in large measure been made virtually inevitable by the role which the United States has played in the world since World War II. As the U.S. role in both military and economic development has expanded beyond anything conceived in the past, as large numbers of Americans, military and civilian, have been detailed to work abroad on our foreign policy, as billions of dollars have been devoted to this effort the very magnitude of the effort has meant less opportunity for detailed congressional review and oversight.

But I think it would be wrong to think that the Executive has usurped power, or that the Congress has not decisively and consciously supported our post-war foreign policy. That foreign policy was constructed largely out of the felt threat of an aggressive communism and the need to contain it on a worldwide basis. Our structure of defense alliances—NATO, CENTO, SEATO—our military assistance programs—our bases abroad—and even our economic assistance programs—had broad congressional and public support of a bipartisan nature. The authorizations out of the alliance system and the foreign assistance legislation—not to mention other international involvements of a multilateral nature such as the UN, GATT, the ILO, and other U.N.-related agencies—were indeed extensive. And if some of these arrangements were secret—or now seem to have overcommitted the United States—I think it fair to say that it is highly doubtful that they would have been so perceived by Congress or the public at the time. Indeed, I believe the Congress was well and adequately informed, although you gentlemen can judge that better than I. I do not believe that I, as a citizen, was ill-informed as to our foreign policy and foreign commitments, even if some of the details remained classified.

But to say what I have said is perhaps somewhat unfair. The Executive has got a great advantage from a leadership point of view in foreign affairs and it is perhaps politically understandable that he exploits. There is at least some truth to all the arguments for strong Executive leadership which date back to the Constitutional Convention itself. The access to secret and expert information: the need to act with dispatch; the need to speak with a single voice; and so forth. To these quite traditional arguments I would add the fact that the President speaks for all the people; his lack of local or regional bias; the trust and confidence that the public places in him, the more so where our security and physical safety is involved; and the general lack of political interest, expertise or profit in foreign affairs on the part of most members of Congress. It is almost unavoidable that Members of Congress will tend to go

along with the President—at least as long as things seem to be going moderately well. To attack the President on foreign policy grounds is hazardous; it does, in fact, make the policy less effective and it tends to have a vague aura of lack of patriotism—a feeling Presidents have little hesitation in exploiting. In times of foreign difficulty or crisis there are many who feel it important to mute criticism in the knowledge that the very fact of division at home makes any foreign policy less effective abroad.

I say all this because I think it would be a practical mistake to believe that the errors of our foreign policy have been caused by too broad a delegation of authority to the President, too passive an attitude on the part of the Congress. We may indeed have overextended ourselves, have overcommitted our power, have played too active a role. But I believe this was the sentiment of the Congress and the country, not the result of any presidential usurpation of power.

In general, I believe that the result of a greater congressional role will be a less active and somewhat less responsive foreign policy. To a degree, at least, that fits the temper of the times. But I believe that a strong Presidency is both desirable and necessary in the conduct of foreign policy. And I would be reluctant to see our foreign policy bogged down in congressional review of unessential detail.

I do think there is merit to the proposal before you, though I could not support it in its present form. I think Congress is entitled to know, if it wishes, every formal obligation of the United States. I think as is provided in Senator Case's bill, the discipline of having to submit such agreements would be healthy. I do not believe, however, that Congress can constitutionally qualify the power of the Executive to enter into such agreements when they are within his own traditional constitutional prerogatives, at least not by concurrent resolution. Frankly, I believe the purpose of the legislation is served if the President submits such agreements and Congress, in its wisdom, expresses its collective or individual views. If the purpose is to involve the Congress and a political check on the President, I think mere submission will serve the purpose in ordinary times.

I emphasize in ordinary times. Our foreign policy normally does reflect a broad consensus. Particular acts may be criticized—sometimes for short-term political reasons. A President, confident of broad gaged support, can ride the criticism of an immediate unpopular act more easily than can the individual Congressman or Senator. There is merit in not forcing every issue to a vote, and in allowing the President some latitude. Ordinarily he wants and needs that broad underlying consensus, knowing that our policy cannot hope to be successful without it.

That may not be the case at the moment, when we are badly divided and when the President is—in his judgment—trying to salvage what can be salvaged from past mistakes which, if I may say so, were the mistakes of all of us. In his anxiety to prove the value of his policy the President has, I believe, taken quite extreme constitutional views. My hope would be that the Congress does not also over-react.

Thank you.

Senator ERVIN. Now, you, I think quite rightly, raise the point that there are certain executive agreements which a President is

empowered by the Constitution to make, I think illustrated by the Belmont and the Pink cases where as I construe them, the court held in substance that the power of the President to recognize—receive foreign ambassadors and ministers gave him the power to prescribe conditions for recognition, and, of course, Congress wouldn't have the power, as you point out, to nullify by concurrent resolution or any other means, agreements of that nature. As you also pointed out, many of the executive agreements are made in implementation of policies which have been expressed and authorized by congressional act.

What do you think about the proposed measures in S.3475 which would require disclosure of executive agreements to the Congress a proposal—I take it you favor the presenting to Congress of executive agreements subject to restrictions as to secrecy where they are sensitive in nature.

Mr. KATZENBACH. Yes, I do, Mr. Chairman. I even have some reservations on the secrecy point. I am inclined to think that has been rather overdone and I think secret agreements don't really have the base of popular support they ought to have if you are going to have a commitment. And very often secret agreements are made, I think, because the foreign government doesn't really want the people in this country to know. I am not sure that is a real good agreement to put a lot of weight on. I think that is pretty thin ice.

Senator ERVIN. I think all of us who have had much experience in Washington think that attempts to keep secrets are rather far too numerous in actual practice and that in many instances there is little justification for the secrecy imposed by the executive branch.

Mr. KATZENBACH. I think that is right, Mr. Chairman, and I am inclined to think if they had to submit everything, secret or not, there would be less secret agreements entered into and submitted.

Senator ERVIN. Now, there is a statute which requires the State Department to make public all executive agreements but the publication which the State Department makes in compliance with that statute, or attempted compliance, is so brief in nature it really doesn't give you any information about the contents of the secret agreements in a great majority of cases because of the very brevity.

Now, would you see any constitutional objection to an amendment to this bill that would provide that even in cases where the making of executive agreement is in exercise of the constitutional powers of the President, that those agreements should also be filed with the Congress and, of course, leaving the Congress with the power to pass a resolution giving the sense of the Congress as well is wise or unwise?

Mr. KATZENBACH. No. I don't see any difficulty with that, Mr. Chairman. In fact, I think that is in essence what I meant. When they want to pass a resolution or individual Senators want to get up and say they think this went too far, I think that is healthy. I think the President would like to know how much support he has in most instances.

Senator ERVIN. Now, recently we have had a great expression of dissatisfaction in the Senate with respect to the agreement about the Spanish bases and also certain other agreements which in effect require Congress either to go along with them or run the risk of

repudiating the agreement. These agreements certainly fall within the implementing of power of Congress in that they call for the exercise of the power of the purse, the controversy surrounding this matter is deeply rooted in the fact that there has been a great claim of power by the Executive. The President has claimed inherent powers in many other fields and in my judgment there has been a very great attempt of the present administration to expand what we call executive privilege far beyond its legitimate scope. All of this has produced a great effort on the part of many Congressmen to try to recapture congressional prerogatives which they feel have been usurped.

Mr. KATZENBACH. Yes. I understand that, and basically I sympathize with it, though I put a note of caution on it because Congress has got a great deal of business before it and Mr. Chairman, to be candid, it doesn't always deal with that in the efficient way, has trouble getting through much of urgent business of the country as it is now, and I think one has to be cautious about all of the built-in possibilities that exist for delay, for not considering, for things falling by the wayside. In fact, I would add a word to what you have just said. I think that probably it is not possible to prevent the President, any President, in the conduct of foreign relations, from putting the country into some pretty difficult positions. I think there just isn't any way you can control the President to prevent this.

I think it is fair to say that if you are going to have bases in Spain, when you are in the process of doing that you are undertaking some pretty open-ended possible commitments, whether you make them in writing or whether they simply come out under the facts. Those bases can be attacked. You do have planes there, weapons there. There can be local attack on them. It can be a foreign attack on them. There are all kinds of things that can occur.

I think this has to be within the contemplation when one establishes bases.

And then finally, I want to add what I hinted at least in my statement. I think President Nixon has made some very broad claims as to inherent rights of the Presidency. I believe he has made these not so much as a matter of principle as the fact that he has found himself in a very divided situation with respect to Vietnam, and if he were to put these kinds of issues to the Congress at this stage of the game, I think he would feel he was not exercising leadership and be in all kinds of difficulties. There would be delays. Things would not be done.

I suspect it is that kind of consideration that has led him to make some very broad claims, Mr. Chairman, which in other times I think the President would be more hesitant to make.

Senator ERVIN. Of course, the President, being a human being, is subject to the same fallibility that all the rest of us are subject to. He finds it much easier sometimes to make an executive agreement than it is to subject himself to the danger of having senatorial opposition which might arise in cases submitted in a formal treaty.

Mr. KATZENBACH. Yes. Sometimes justified and the record on that is spotty. Sometimes there are terribly picayune objections to something that was difficult to negotiate. While the Senate and the House

are very well equipped to do their own negotiation on their own legislation, when you involve a third party, first negotiating with it, then submitting the result to the Senate, the institution just doesn't work as well.

Senator ERVIN. Well, there is no doubt of the fact that the President can operate with much more ease since he has only himself to consult and must take advice only if he wishes to and then from his own selected advisers.

Mr. KATZENBACH. Yes.

Senator ERVIN. You have 100 different minds in the Senate and 435 different minds in the House. One reason I opposed the War Powers Act was because, as I read it there are certain situations in which the President has to take immediate action of a military nature without the consent of Congress such as when the country is threatened with an attack or invasion. The War Powers Act required him to consult after the expiration of 30 days with 535 more commanders in chief. No Army that has that many commanders in chief ever won a skirmish, much less a war, because some of them would command the army to advance, and others command it to retreat, then others would command it to stand still. The framers of the Constitution foresaw that concentration of Executive powers in the President is necessary, for actual command of the military forces in times of impending military peril.

As you point out, we must recognize as an historical fact that the present situation in Vietnam is more or less with expressed approval or at least the tacit acquiescence of most of us.

Mr. KATZENBACH. I believe that is true. I don't say that in defense of Vietnam or in criticism. I think it is just a fact.

Senator ERVIN. Senator Gurney.

Senator GURNEY. On this business of Vietnam, Mr. Katzenbach, and the expression of views of Congress on what the President has done or hasn't done, it strikes me as though we have on many occasions in the last 2 or 3 years reviewed the President's foreign policy week after week after week in the Senate, at least. Don't you agree that that is true?

Mr. KATZENBACH. Yes, I do, Senator. I think that in the review there has been considerable division of views as to whether it is right or whether it is wrong.

Senator GURNEY. Of course, this involved very clear constitutional power as commander in chief. So it does seem as though if Congress really wants to express itself and exert its opinion, it does have ample opportunity to do that and I don't suppose there has been a time in our history when we have seen that more in evidence than now.

Mr. KATZENBACH. I think this is right, Senator. I think that if the Congress wishes to assert itself in that area, indeed in many of the areas that it has never spoken on in foreign affairs, it could do so. And I think that the President would be bound by it. I think that the Congress of the United States has the power to say we are going to withdraw from Vietnam if that is what they want to do and if they say that, the President in executing the laws faithfully is bound to do so.

Senator GURNEY. Following that line of argument as far as executive agreements are concerned, let's take the example of say, bases in Spain. You have said in the statement before us you have had close firsthand knowledge of a lot of these situations. My question is could not Congress also in its appropriations capacity and its investigative capacity exercise a rather decisive role in executive agreements if it wanted to with its present powers?

Mr. KATZENBACH. Oh, yes. I think it could, Senator. To pick up a point the Chairman raised, I believe even in an area where you would question the legislative capacity, that is, something within the President's own powers, I would guess two things. One, the resolution of the Congress substantially disapproving of something would have a great deal of influence with any President. And secondly, in most of those instances there is another way to skin that cat, whether it is the appropriations power, whether it is another area that they can validly legislate in, where you can at least get to the point of frustrating what the President wants to do, and in a way that is fair game. That is what I think the separation of powers is in part all about, that each Congress and President can frustrate each other and that tends to make for a happier marriage.

Senator GURNEY. Well, I am sure all of us here—I know how deeply Senator Ervin, our chairman feels about this—could point out instances where perhaps the President has been arrogant, say, in his use of executive agreements. What thought do you have on the fact that perhaps Congress has let him have his head in this area over the years?

Mr. KATZENBACH. I think Congress has let him have his head in this area over the years, Senator, and I don't think that has been totally a bad thing. You can pull it up from time to time and I think it is very important that the Congress understands at least in the broad lines what the foreign policy is, what the risks are, what may happen, and I think you really ought to reduce those risks to the level which an overwhelming majority of the Congress will support. You really can't run a foreign policy that 51 Senators support. And when you have that basis, I think from there on the President really ought to play the greater role and that there should be quite broad delegations of authority within that general framework to him. It doesn't mean he is going to be right. It doesn't even mean that all of us are going to be right. We may make mistakes.

Senator GURNEY. Of course, there is another subject, too, which we can hardly get into here. We know, of course, that Presidents, and this certainly includes the last two, probably President Kennedy too to some extent, even going back to President Wilson we found that there were too many bodies and minds to consult even in the State Department, and so they set up a little group within the Executive Office itself, the White House, in order to make swift decisions on foreign policy issues. And I suppose that is all a part of this situation too, since it—

Mr. KATZENBACH. Well, I think it is. I think if I were a member of the Senate I would be concerned about that. At least from the point of view of executive privilege. I think that—I am trying to not be political about this. It certainly started as you point out long before President Nixon, but if Mr. Kissinger, Mr. Rostow, Mr.

Bundy before him, was an important maker of foreign policy, then I really don't think he should be insulated from Congressional inquiry.

Senator GURNEY. Well, as I say, this opens up a whole field and I know there are some of us who show that concern. I am sure our Chairman does, too.

I don't have any further questions.

Senator ERVIN. Well, that is a comparatively recent development of the President having in a sense a little State Department or little Defense Department and all the other departments in the White House in addition to the regular departments of government. This situation has resulted in the development of a theory, which was exemplified in the hearings on the Kleindienst nomination, that an aide to the President is not compelled to testify before Congress even though the transactions in question were with third parties or the transactions have been revealed in previous testimony. In that case we did have a little leverage over the President and finally some of us threatened to take no action at all on the nomination unless Mr. Flanigan came down and testified and we were glad to note that at long last the President relented, if, indeed, the President had originally made any decision himself with respect to the matter.

Mr. KATZENBACH. I think it is basically healthy that people making policy in the executive branch know where the Capitol Building is.

Senator GURNEY. The chairman is being modest. He had a great deal to do with that himself.

Mr. KATZENBACH. I am aware of that.

Senator GURNEY. He wields considerable power around here.

Senator ERVIN. I note your reference to Professor Corwin. As I understand this theory of the Constitution, the powers of government were separated and that one of the objectives was to create certain amounts of friction between the branches, each branch trying to protect its prerogatives as it construed them to be against the others, but you very wisely emphasize that that also necessitates a development of consensus between the Executive and the Congress.

Mr. KATZENBACH. Our history indicates——

Senator ERVIN. I think that is one of the things that keeps our Government in a sensible posture. You have to recognize that this eternal friction which arises out of each branch trying to conserve its prerogatives against what it conceives to be onslaughts of the others does tend to keep us from going off, unchecked, in any arbitrary direction.

Mr. KATZENBACH. I think that is true, Mr. Chairman. Whenever you get into that constitutional crisis, neither side gives up principle. Each side retreats a little bit into a practical resolution.

Professor KURLAND. Mr. Katzenbach, at the beginning of your statement you said executive agreements and treaties are largely interchangeable devices. I assume by that you mean the subject matter—you cannot draw a distinction in terms of subject matter between agreements that take the form of treaties and agreements that take the form of Executive Agreements.

Mr. KATZENBACH. That is right.

Professor KURLAND. You go on to suggest that there are executive agreements which are subject to approval by both Houses in order to perpetuate and the treaty is subject to approval by two thirds of the Senate. Our problem, it seems to me, falls in the third category of agreements and that is where there is neither legislative nor required approval of the Senate, and here you suggest the Congress with the power to do what it will, even in the field of foreign affairs, is affected by the lack of knowledge as to what these agreements are.

Now, do I read your position correctly, that you are saying you think all agreements, indeed some of the bills permitting them to remain secret, should be brought to the attention of the Congressional bodies?

Mr. KATZENBACH. Yes, I do.

Professor KURLAND. If I may go back to your proposition that Congress has almost plenary potential in the area of foreign affairs as well, is this in terms of the powers of the purse or in terms of substantive decision on foreign policy?

Mr. KATZENBACH. I think really both, because I at least am reluctant to believe that the power of the purse, appropriations power, goes well beyond what you can simply do in the use of the legislative power. I don't like it. So since I don't like it, I tend to feel that there is a lot of substantive authority. I think the Congress can say you aren't going to station or have troops in Vietnam. I don't think it has to say we won't appropriate any money for troops in Vietnam. I think it can do it directly.

In the area we are talking about here, the Constitution was a document that gave Congress a great deal of power. It was basically aimed to give to the Congress a great deal of power.

Professor KURLAND. Can the Congress in retrospect say the agreement which you have entered with such and such a foreign power may not be effectuated?

Mr. KATZENBACH. I don't really know. It is hard to say, not knowing what the agreement was. Was the agreement—lets take the most difficult area. Take the recognition area and assume that you have *Pink* and *Belmont* decided in the face of legislation that contradicted that executive agreement. I suppose the courts would have given effect to the subsequent legislation and said that the executive agreement fell even if the executive agreement could have been entered into, as they held, without any need for any Congressional authorization.

Professor KURLAND. And if the President were to enter into an agreement with some foreign country to assure its protection against external attack, I assume the Congress can on that thesis reject that agreement.

Mr. KATZENBACH. Yes. It gets a little meaningless, doesn't it, because if the Congress passed concurrent resolution saying we have no intention of appropriating any money or sending any troops, this foreign government really ought to understand we don't intend to do that. You wouldn't have a very good agreement without getting into our constitutional basis at all.

Professor KURLAND. Except one problem. So much of the Congressional appropriations legislation is in such broad terms that

there is a great deal of financial capacity disposable by the President.

Mr. KATZENBACH. Unless the Congress acts.

Professor KURLAND. That is right.

Mr. KATZENBACH. Yes.

Professor KURLAND. So you feel Congressional action would be quite meaningful even with regard to discretionary funds, if your thesis is correct?

Mr. KATZENBACH. Yes.

Professor KURLAND. Thank you.

Mr. EDMISTEN. Mr. Katzenbach, if those areas in which the President is granted exclusive power by the Constitution were weeded out, do you think this bill would unduly hamper the executive branch of the Government in its operations in the field of foreign affairs?

Mr. KATZENBACH. No, I wouldn't, but I would be wary of weeding out. If there is anything to what I was saying with Mr. Kurland, and there may not be, but if there is, be careful what you weed out because you are going to end up giving away a lot of legislative powers, powers that you could act on. But I would agree with you, if you weeded those out—you are still—no, you are still left with the implied authorization and then reversing that authorization by concurrent resolution. And that is a very difficult question and I don't really know that—I really don't know how far the Congress can get around the veto power to be very honest.

Senator ERVIN. Is it not true that a large part of the difficulty and confusion in this field grows out of the fact that the Constitution itself nowhere defines what shall be the subject for treaty?

Mr. KATZENBACH. That is right.

Senator ERVIN. Thank you very much for a most intriguing and illuminating set of observations.

Mr. KATZENBACH. Thank you, Mr. Chairman.

BIOGRAPHICAL INFORMATION—NICHOLAS KATZENBACH, DIRECTOR, VICE PRESIDENT AND GENERAL COUNSEL, INTERNATIONAL BUSINESS MACHINES CORP.

Nicholas deB. Katzenbach was elected vice president and general counsel of International Business Machines Corporation in January, 1969. In November, 1970 Mr. Katzenbach was elected a director.

Mr. Katzenbach was formerly U.S. Under Secretary of State, a post he was appointed to in 1966: Previously he had been U.S. Attorney General from 1963 to 1966; Acting Attorney General in 1964; Deputy Attorney General from 1962 to 1964; and Assistant Attorney General from 1961 to 1962.

Before joining the Justice Department, Mr. Katzenbach was a professor of law at the University of Chicago from 1956 to 1960, and an associate professor at the Yale Law School from 1952 to 1956.

Mr. Katzenbach graduated from Phillips Exeter Academy and enrolled at Princeton University, but left to join the Army Air Force during World War II. The plane on which he was navigator was shot down over the Mediterranean in 1943 and he spent 27 months in prisoner-of-war camps, during which time he twice escaped and was recaptured. Returning to Princeton after the war, he completed his studies and later received an LL.B. degree from Yale Law School. He then won a Rhodes Scholarship to Oxford University from 1947 to 1949.

In 1950 Mr. Katzenbach entered private law practice with the firm of Katzenbach, Gildea and Rudner in Trenton, N.J. He later went to the Pentagon to serve as attorney-adviser and consultant in the Office of the General Counsel

to the Secretary of the Air Force until 1932, when he joined the faculty at Yale Law School.

Mr. Katzenbach is a member of the American Law Institute, the American Bar Association and the American Judicature Society. He is the recipient of honorary degrees from Princeton, Rutgers, Georgetown, Northeastern, Seton Hall, Bridgeport, Brandeis and Tufts Universities. He is also an alumni trustee of Princeton University.

Senator ERVIN. Counsel will call the next witness.

Mr. EDMISTEN. Mr. Chairman, the next witness is Hon. John R. Stevenson, the legal adviser of the State Department.

STATEMENT OF HON. JOHN R. STEVENSON, LEGAL ADVISER, DEPARTMENT OF STATE; ACCOMPANIED BY CHARLES BEVANS, ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS

Senator ERVIN. Mr. Stevenson, I wish to welcome you to the committee and express our deep appreciation for your willingness to come and give us the benefit of your observations and views in the field in which you have much practical experience.

Mr. STEVENSON. Thank you very much, Mr. Chairman. It is a pleasure to be with you.

I have with me Mr. Charles Bevans, who is the assistant legal adviser for treaty affairs, the man who has the greatest experience in this area of anyone in the government.

Senator ERVIN. We are delighted to have him with us also.

Mr. STEVENSON. Thank you, Mr. Chairman.

Mr. Chairman, I am grateful for this opportunity to appear before this subcommittee to consider with you a series of issues which I believe are of fundamental importance to our constitutional system. I hope these hearings can contribute to a better understanding of the constitutional relationship between the legislative and executive branches in the field of foreign relations.

The subcommittee is addressing itself in these hearings to executive-legislative relations in foreign affairs with special emphasis on executive agreements. I am gratified that you are analyzing the problem of executive agreements in the context of the management of foreign affairs generally, since I believe it is essential to consider the problem as a whole. These hearings come at a most opportune time for the Department of State, for we are now considering revision of our so-called Circular 175 Procedure by which we determine the appropriateness of concluding a given agreement as a treaty or as an executive agreement. These hearings could contribute in an important way to our revision and updating of this procedure.

Let me begin this morning by giving you some background on recent U.S. practice with respect to treaties and executive agreements. I will then turn to an analysis of the concerns which have been raised recently about the use of executive agreements and of the constitutional aspects of the problem in that specific context.

I. RECENT U.S. PRACTICE

In the period since World War II, the volume and diversity of international agreements entered into by the United States has

expanded at a rapid pace. The total number of treaties and other international agreements in force for the United States as of January 1, 1972, was 5,306, consisting of 947 treaties and 4,359 executive agreements. Between January 20, 1969, when this administration took office, and May 1, 1972, 71 treaties and 608 executive agreements were concluded.

As you know, the term executive agreements does not distinguish between agreements concluded with prior or subsequent statutory authority, on the one hand, and those concluded in exercise of the independent powers of the President under the Constitution, on the other. Of the large number of executive agreements to which I have referred, over 97 percent are of the former type—that is, previously or subsequently authorized by statute.

The figures I have cited do not include agreements concluded by individual agencies of the government with their counterparts in other governments. These agreements are frequently the means by which working arrangements are made for various kinds of cooperation within the framework of existing relationships. They usually involve undertakings which are fully within the capability and legal (i.e., statutory) authority of the respective United States and foreign agencies concerned.¹

A number of those agreements are in implementation of provisions of existing international agreements. Others are part of a traditional practice of cooperation, as in the case of arrangements for cooperation between law enforcement authorities dealing with certain criminal activities having an international dimension.

The rapid expansion of the volume of international agreements to which I have referred results from the obvious fact that improved communication and transportation, and the expansion of international trade and financial relationships, as well as international travel—in addition, of course, to expanded cooperation and assistance in a number of areas—have created a need for a wide variety of practical arrangements between governments. For example, over 1,000 of our present executive agreements deal with the sale of surplus agricultural commodities. All of these are generally matters of a rather detailed sort which are short-term or subject to frequent alteration or adjustments and involve no basic changes in political relationships, and they have accordingly been concluded as executive agreements. It is for this reason that the number of executive agreements has expanded so rapidly by comparison to treaties. It should not be inferred from the numbers that executive agreements have increasingly been used in place of treaties for purposes for which treaties had previously been used.

In the face of this expansion of international agreements, the Department in 1953 established guidelines²—known as Department Circular 175 Procedure—to ensure that there would be appropriate consideration of any political and legal issues involved in the conclusion of each international agreement.

¹ See Staff of the Senate Committee on Aeronautical and Space Sciences, 89th Cong., 1st Sess., U.S. International Space Programs, S. Doc. 44, at 5 (1965).

² Department of State Circular 25, May 15, 1953, superseded in 1955 by Circular 175, codified in 11 Foreign Affairs Manual (FAM) Sec. 700 *et seq.*

With respect to the decision whether an agreement should be concluded as an executive agreement or as a treaty, the Department's guidelines provide as follows:

Executive agreements should not be used when the subject matter should be covered by a treaty. The executive agreement form should be used only for agreements which fall into one or more of the following categories:

(a) Agreements which are made pursuant to or in accordance with existing legislation or a treaty;

(b) agreements which are made subject to congressional approval or implementation; or

(c) agreements which are made under and in accordance with the President's constitutional power.³

These standards are, of course, quite general in nature and are not always particularly helpful in deciding how a given agreement should be treated. However, the legal adviser's office has established and applied more specific criteria in determining whether an agreement should be a treaty or an executive agreement. We have taken the view that the treaty form should be used in five circumstances—(a) when the subject matter has traditionally been dealt with by treaty; (b) when the subject matter is not wholly within the delegated powers of the Congress and not within the independent constitutional authority of the President; (c) when the agreement itself is to have the force of law without legislative action by the Congress, and the action contemplated is not within the President's independent constitutional authority; (d) when the agreement involves important commitments affecting the nation as a whole, such as our defense commitments; or (e) when it is decided to give utmost formality to the commitment.⁴

At the same time, it has been our experience that it is not possible to develop an absolutely precise formula because that would require a definition of the entire scope of the President's authority and of the entire scope of the delegated powers of Congress and its powers under the so-called "necessary and proper" clause. As Secretary of State Dulles acknowledged during testimony in 1953 relative to the "Bricker Amendment,"

It has long been recognized that difficulties exist in the determination as to which international agreements should be submitted to the Senate as treaties, which ones should be submitted to both Houses of Congress, and which ones do not require any congressional approval.⁵

He recognized, however, that the Congress is entitled to know the considerations that enter into determinations as to which procedures are followed and indicated that, where there was any serious question of this nature and circumstances permitted, the Executive branch would consult with appropriate congressional leaders and committees in determining the more suitable way of handling international agreements as they arose.⁶ The requirement for congressional consultations in these situations was incorporated in the

³ 11 FAM Sec. 722.

⁴ 14 Whiteman, *Digest of International Law* 209 (1970).

⁵ *Hearings before a Subcommittee of the Senate Committee on the Judiciary on Treaties and Executive Agreements*, 83 Cong., 1st Sess. 828 (1953).

⁶ *Id.* at 828-829.

Department's own guidelines.⁷ On March 21, 1972, in a letter to Senator Case, Assistant Secretary Abshire reaffirmed that it would continue to be the Department's policy:

* * * to make every effort to keep the appropriate congressional committees informed of important agreements under negotiation and to consult with those committees whenever there is a serious question whether an international agreement is to be made in the form of a treaty or otherwise."⁸

Against this general background, Mr. Chairman, let us consider the record of the Nixon Administration with respect to the use of the treaty and Executive agreement forms. The President has submitted to the Senate, for its advice and consent to ratification, 51 treaties. These include 22 bilateral treaties dealing with the following subjects: boundary waters, consuls, cultural property, extradition, the reversion of Okinawa, taxation, and telecommunications. The agreement on the reversion of Okinawa, as you know, was submitted in the form of a treaty after precisely the kind of consultations called for in the Department's guidelines.

There were 28 multilateral treaties on the following subjects: atomic energy; aviation; consuls; copyright; cultural property; fisheries; gas warfare; hijacking; industrial and intellectual property; judicial procedure; law of treaties; narcotic drugs; oil pollution; the Latin American nuclear free zone; privileges and immunities; seabed arms control; telecommunications; terrorism; and wheat.

The Senate presently has before it several important treaties, including the 1925 Geneva Protocol relating to chemical and biological warfare; the Convention on the Prevention and Punishment of the Crime of Genocide; the Vienna Convention on the Law of Treaties; the Convention on Psychotropic Substances; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance; the Convention on the Taking of Evidence Abroad in Civil or Commercial matters; the Treaty with Argentina on Extradition; the Treaty with Honduras on the Swan Islands; and the Convention with Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Property.

Since the beginning of the Nixon Administration, the United States has concluded a total of 608 executive agreements on a wide variety of subjects. Yet it is only with respect to a very limited category of agreements that concern has been expressed as to the form of agreement. I think this is extremely significant, because I believe it demonstrates that the real concern is not with the form of agreement per se but with other matters which only incidentally involve the use of agreements.

II. RECENT CONCERNS

As members of the subcommittee will remember, there was in the early 1950's a great deal of concern about the conclusion and opera-

⁷ 11 FAM Sec. 723.1.

⁸ 118 Cong. Rec. (daily ed.), No. 51, April 4, 1972, at S 5310.

tion of both treaties and executive agreements, particularly in connection with the so-called Bricker amendment.⁹

Although some versions of that amendment did contain provisions designed to restrict the use of executive agreements,¹⁰ the main issue there was the domestic legal effect of both treaties and executive agreements and the extent to which the Federal Government could use either form of agreement as a means of taking measures which would otherwise be beyond its constitutional power.

The kinds of concerns which are now being expressed, however, are much narrower than that. I think essentially all of the criticism that has been made recently about the conclusion of agreements as executive agreements rather than treaties has been directed at agreements in which the primary United States interest relates to defense or military matters. For example, as you know, Senator Case has recently introduced a bill¹¹ which seeks to compel the President to submit as treaties agreements concluded with Portugal and Bahrain concerning use of certain defense-related facilities. And there was, of course, a great deal of discussion of the Spanish Base Agreement.¹²

Under Secretary Johnson has discussed all three of those agreements at considerable length in hearings before the Foreign Relations Committee,¹³ and I do not believe it would be productive for me to go over that ground again here. However, in light of the particular interest in the subject of agreements related to deployment abroad of U.S. forces, I think it may be useful for me to take up the constitutional issues involved in the use of executive agreements, particularly those related to force deployments.

III. CONSTITUTIONAL POWERS OF THE PRESIDENT AND CONGRESS AS APPLIED TO DEFENSE-RELATED AGREEMENTS

Since Assistant Attorney General Erickson will discuss tomorrow the general constitutional background of the use of executive agreements, I will not attempt to deal with the subject in a comprehen-

⁹ S.J. Res. 130, 82nd Cong., 2d Sess. (1952); S.J. Res. 1, 83rd Cong., 1st Sess. (1953); S.J. Res. 1, 84th Cong., 1st Sess. (1955); S.J. Res. 3, 85th Cong., 1st Sess. (1957).

¹⁰ Section 4 of the amendment as contained in S.J. Res. 130 (1952), would have prohibited the use of executive agreements "In lieu of treaties" and provided that all executive agreements would terminate automatically 1 year after the end of the term of office of the President making the agreement unless extended by Congress. Section 4 of the amendment as set forth in S.J. Res. (1953) as originally introduced would have provided in part that:

"All executive or other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent prescribed by law."

Section 3 of the version reported by the Senate Judiciary Committee (S. Rep. 412, 83rd Cong., 1st Sess. (1953)) provided in part that:

"Congress shall have the power to regulate all executive and other agreements with any foreign power or international organization."

No such provisions were contained in S.J. Res. 1 (1955), either as originally proposed or as reported by the Senate Judiciary Committee (S. Rep. 1716, 84th Cong., 2d Sess. (1956)), or in S.J. Res. 3 (1957).

¹¹ S. 3447, 92nd Cong., 2d Sess. (1972).

¹² See generally *Hearing before the Senate Committee on Foreign Relations on the Agreement of Friendship and Cooperation between the United States of America and Spain*, 91st Cong., 2d Sess. (1970), hereinafter cited as *Hearing on the Spanish Base Agreement*.

¹³ *Hearing on the Spanish Base Agreement* at 9-49; *Hearings before the Senate Committee on Foreign Relations on S. Res. 214 Relative to the Submission of any Portuguese Base Agreement as a Treaty*, 92d Cong., 2d Sess. 5-68 (1972), hereinafter cited as *Hearings on Executive Agreements with Portugal and Bahrain*.

sive way but will only note briefly that the authority of the President to conclude international agreements other than treaties flows from several of his enumerated powers.¹⁴

Agreements concerning military matters are based at least in part on the President's power as Commander in chief of the armed forces.¹⁵ This includes not only purely military agreements, such as practical arrangements for cooperation with other nations in defense matters, but also, for example, agreements on conditions of armistice, including the administration of occupied territory pending conclusion of a peace treaty.¹⁶

The President's authority to conclude executive agreements may also derive from his treaty powers.¹⁷ Although treaties can be made only by and with the advice and consent of the Senate, it is the President alone who negotiates,¹⁸ and the process of negotiation may include the conclusion of protocols which represent stages in those negotiations, or a *modus vivendi* in limited terms designed to serve as a temporary measure pending the conclusion of a treaty.¹⁹

The power to receive ambassadors and other public ministers²⁰ has been a partial basis for agreements incident to the recognition of foreign governments, including such matters as the settlement of foreign claims.²¹

The provision empowering the President to take care that all the laws be faithfully executed,²² provides a basis for agreements designed to implement certain provisions of the Constitution, statutes, and treaties, as well as other international obligations of the United States.²³

More generally, and under the authority of the executive power clause,²⁴ the President acts as the sole organ of the Nation in its external relations and its sole representative with foreign nations.²⁵ Or, as Thomas Jefferson so aptly put it: "The transaction of business with foreign nations is executive altogether." And the normal conduct of foreign relations continually requires the conclusion of agreements of various sorts to compose differences with other gov-

¹⁴ The following discussion of various types of agreements in terms of specific powers is drawn largely from McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L. J. 181, 244-252 (1945). This breakdown is unquestionably somewhat arbitrary, since most, if not all, of the types of agreement referred to are at least arguably based on a conjunction of two or more of the President's enumerated powers.

¹⁵ U.S. Constitution, art. II, sec. 2, par. 1. See opinion of the Attorney General regarding the acquisition of Naval and Air Bases in exchange for overage destroyers, 39 Op. Atty. Gen. 484, 486 (1940); McDougal and Lans, supra note 14 at 245-247; Borchard, *Treaties and Executive Agreements—A Reply*, 54 Yale L. J. 616, 649 (1945); 1 Willoughby, *The Constitutional Law of the United States*, sec. 298, pp. 540-541 (2d ed. 1929); Corwin, ed., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. 170, 82d Cong., 1st sess. 433 (1952), repeated in 1964 ed., S. Doc. 39, 88th Cong., 1st sess. 484 (1964).

¹⁶ McDougal and Lans, supra note 14 at 246-247; Corwin, supra note 15, 1953 ed. at 434-435, 1964 ed. at 485-486.

¹⁷ U.S. Constitution, art. II, sec. 2, par. 2.

¹⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

¹⁹ Corwin, supra note 15, 1952 ed. at 433, 1964 ed. at 485.

²⁰ U.S. Constitution, art. II, sec. 3.

²¹ *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); McDougal and Lans, supra note 14 at 247-248.

²² U.S. Constitution, art. II, sec. 3.

²³ 1 Op. Atty. Gen. 566, 570-571 (1822); McDougal and Lans, supra note 14 at 248; Corwin, supra note 15, 1952 ed. at 441-445, 1964 ed. at 492-497.

²⁴ U.S. Constitution, art. II, sec. 1, par. 1.

²⁵ *United States v. Curtiss-Wright Export Corp.*, supra note 18 at 319.

ernments, or regulate matters of mutual concern, and thus insure the satisfactory continuation of diplomatic relations.²⁶

With respect to agreements concerning military matters, such as those under which rights are acquired to use defense-related facilities abroad, the agreement-making authority of the President, as I have indicated, flows at least in part from his powers as Commander-in-Chief.²⁷ At the same time, Congress also has extensive powers in the defense area. In particular, under article I, section 8 of the Constitution, the Congress is given the explicit powers:

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

To provide and maintain a navy.

To make rules for the government and regulation of the land and naval forces.²⁸

In addition, of course, Congress has the general power:

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.²⁹

Agreements relating to military and defense matters thus involve a broad area of responsibility in which certain constitutional powers are shared between the Executive and the Congress. This results in a rather complex legal situation in which the lines of constitutional authority are somewhat unclear, but which can at least be analyzed in general terms.

Probably the best judicial discussion of the constitutional relationship between the two branches in this sort of situation is contained in the well-known concurring opinion of Mr. Justice Jackson in the *Steel Seizure* case.³⁰ In that opinion, Justice Jackson addressed the general doctrine of separation of powers in the following terms:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoined upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.³¹

Starting from this basic premise, he compared the powers of the President in three different circumstances.

In the first, when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, since it includes not only his own independent powers but also whatever powers Congress can delegate.

The second situation is one in which, in the absence of either a grant or a denial of authority by Congress, the President acts on the basis of his independent powers alone. Here it may be the absence of any congressional action, in an area in which the President and Congress have concurrent authority, that enables the President to act independently.

²⁶ McDougal and Lans, *supra* note 14 at 248-252; Corwin, *supra* note 15, 1952 ed. at 433, 1964 ed. at 484-485.

²⁷ See 39 Op. Atty. Gen. 484, 486 (1940).

²⁸ U.S. Constitution, art. I, sec. 8, cls. 11, 12, 13, and 14.

²⁹ *Id.*, cl. 18.

³⁰ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³¹ *Id.* at 635.

Finally, when the President takes measures incompatible with the expressed or implicit will of Congress, his power is at its minimum, since he then can act only upon the basis of his own independent powers minus the powers of Congress over the particular matter in question.³²

Now, the problem Justice Jackson was discussing there did not involve agreements, but I believe his opinion does contain some useful guidelines for our understanding of the division of constitutional powers with respect to executive agreements, in particular those agreements relating to military or defense matters. It enables us to address the constitutional question in terms of three distinct categories of executive agreement.³³

The first category consists of agreements which the President cannot carry out without affirmative authority from the Congress. Obvious examples include agreements on tariffs or those requiring the expenditure of public funds.

The second category of agreements includes those for which no affirmative congressional grant of authority is required but which involve matters over which the President and the Congress have concurrent authority. These are agreements which the President has authority to conclude under his independent constitutional powers but which may not be inconsistent with any action which Congress may have taken in the exercise of its own powers over the subject matter.³⁴

The third category of agreements would include those which the executive can conclude in the exercise of his constitutional powers and with which Congress may not constitutionally interfere. This, I think, is a very small category. It would clearly include, for example, certain operational agreements the President deemed necessary under certain circumstances to ensure the safety of U.S. forces under his command.³⁵

³² *Id.* at 635-638.

³³ For similar analyses see "Association of the Bar of the City of New York, a continued defense of the Constitution against the Bricker proposals 11-16 (1955); reprinted from 10 Record of the Association of the Bar of the City of New York, No. 3, pp. 114-142 (1955); and testimony of Alexander M. Bickel in "Hearings before the Senate Committee on Foreign Relations on S. 596, to Require that International Agreements other than Treaties. Hereafter Entered into by the United States, be Transmitted to the Congress within Sixty Days after the Execution Thereof, 92d Cong., 1st Sess. 23-27 (1972)," hereinafter cited as "Hearings on Transmittal of Executive Agreements to Congress."

³⁴ See *United States v. Guy W. Capps, Inc.* 204 F. 2d 655, 658-660 (4th Cir 1953), *aff'd* on other grounds, 318 U.S. 296 (1955); Opinion of the Attorney General regarding the Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 OP. ATT'Y GEN. 484, 494-496 (1940); Sutherland, "The Bricker Amendment, Executive Agreements, and Imported Potatoes, 67 Harv. L. Rev. 281, 285-291 (1953)."

³⁵ See testimony of Alexander M. Bickel, "Hearings on Transmittal of Executive Agreements to Congress 31, 41-42." There are relatively few court cases on the question of the extent to which Congress is constitutionally precluded from interfering with the exercise by the President of his independent constitutional powers. In *Ex Parte Milligan* (71 U.S. (4 Wall.) 2 (1866)), a case which involved the war powers of Congress, the opinion of four concurring Supreme Court Justices stated that:

"Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of forces and the conduct of campaigns. That power and duty belongs to the President as commander-in-chief." (71 U.S. at 139.)

Other cases relating to congressional limitation on powers vested exclusively in the President include *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866) and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) which held unconstitutional attempts by Congress to limit the effect of pardons granted by the President in exercise of his power to do so under article II, section 2 of the Constitution; and *Myers v. United States*, 272 U.S. 52 (1926), which declared invalid a provision of an 1876 statute restricting the power of the President as chief executive to remove from office those officers of the Government appointed by and with the advice and consent of the Senate.

The point that I think emerges from this kind of analysis is that the use of the executive agreement form does not amount to an assertion of unlimited Presidential authority to conclude international agreements without reference to the legitimate interests of Congress in the subject matter. Rather, it generally involves simply one step among many taken by the Executive to effectuate policies in the formulation of which the Congress plays a key role. With this in mind, let us take a closer look at the question of the treaty power, particularly as it bears upon these defense-related agreements.

IV. THE TREATY POWERS OF THE SENATE IN THE CONTEXT OF DEFENSE-RELATED AGREEMENTS

A great deal of argument has recently been devoted to the proposition that the only appropriate form for agreements such as those involving defense-related facilities abroad is the treaty form, which, of course, requires the advice and consent of the Senate to ratification by a two-thirds majority. This is the thrust of the most recent *Case* bill,³⁶ and the argument was pressed at great length with respect to the Spanish Base Agreement.³⁷

I think nobody questions that agreements which involve a basic political commitment, such as an undertaking to come to the defense of another country if it is attacked, should be cast in the form of a treaty in the constitutional sense.³⁸ Such agreements establish basic foreign policy commitments to which our overall defense and security strategies are keyed, and I believe that the framers of the Constitution clearly intended that such fundamental agreements should be subject to the special safeguards of the treaty clause.³⁹

As Under Secretary Johnson made clear, the three facilities agreements which I referred to earlier, with respect to Spain, Bahrain, and The Azores, do not involve any defense commitments whatever on the part of the United States.⁴⁰ They do not require the United States to use the facilities or to station any forces in foreign territory.⁴¹ In this sense, they constitute what Attorney General (later Justice) Jackson referred to in 1940 as "an opportunity that entails no obligation."⁴²

The central argument advanced by those who favor requiring submission, as treaties, of agreements concerning the use of defense-related facilities abroad, is that the deployment abroad of U.S. forces is a major foreign policy action and may involve many of the same

³⁶ Supra note 11.

³⁷ See generally *Hearings on the Spanish Base Agreements*.

³⁸ See, e.g., Testimony of Under Secretary of State for Political Affairs Johnson, *Hearing on the Spanish Base Agreement* at 19, and *Hearings on Executive Agreements with Portugal and Bahrain* at 31.

³⁹ See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-572 (1840). Corwin states that executive agreements become of constitutional significance when they constitute a determinative factor of foreign policy and hence of the country's destiny. *Op. cit.*, supra note 15, 1952 ed. at 433, 1964 ed. at 485.

⁴⁰ *Hearings on the Spanish Base Agreement* at 12; *Hearings on Executive Agreements with Portugal and Bahrain* at 8, 14.

⁴¹ *Id.*

⁴² In connection with the so-called "Destroyers-for-Bases" agreement, Jackson ruled that:

"The executive agreement obtains an opportunity to establish naval and air bases for the protection of our coastline but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation." 39 OP ATT'Y GEN. 484, 487 (1940).

risks as an advance commitment of the "mutual defense" variety.⁴³ And so, the reasoning apparently goes, Congress must require the submission of these agreements as treaties in order to insure effective congressional control of deployments.

I believe this argument confuses the treaty power, which is not really relevant, with other constitutional powers of the Congress and the President. For example, it has been suggested that the dispatch of American troops to an area of actual or potential warfare involves both the treaty power of the Senate and the war powers of Congress.⁴⁴ While it is clear that the war powers do have a bearing on this kind of situation, the argument seems to be that any deployment abroad of Armed Forces automatically involves the treaty powers as well. This proposition has been restated by Senator Fulbright in his testimony earlier in these hearings, in which he set forth his view that a national commitment involving the use of the Armed Forces on foreign territory should be created by the treaty process. Since the mere use of the Armed Forces on foreign territory without any obligation is in itself a national commitment under the definition contained in the "national commitments resolution" to which he referred, he seems to be suggesting that force deployment itself, at least in areas of actual or potential hostilities (though his statement is not entirely clear on this latter point), should be carried out only through the treaty process. I find no warrant in the Constitution for that position.

To begin with, while force deployments on foreign territory normally require the consent of the government in whose territory such deployments take place, that consent is not always embodied in formal agreements. To imagine that the treaty powers relate to matters not involving actual agreements strikes me as a highly novel expansion of the treaty power concept.

Moreover, I think this argument misses the essential point that, even where agreements are involved, they do not necessarily create commitments by the United States.

Agreements permitting the United States to use facilities abroad do not in any sense require deployment of U.S. forces. Critics of the recent agreements have failed to point to a single provision in them which contains a commitment of the U.S. forces there, or to establish a base. The agreements simply constitute action by the President to secure for the United States an "option" to use facilities. The question of whether and how we exercise that option is one of a series of long-term national security decisions in which the Congress plays a vital role. That role includes not only the decision whether to provide funds for the maintenance of facilities abroad, but also such decisions as whether to appropriate money for defense equipment which either requires use of such facilities or renders foreign facilities unnecessary. Thus, the use of the executive agreement procedure in these cases does not in any sense deprive Congress of its opportunity to participate in the overall decisions concerning deployments abroad.

⁴³ *Hearings on Spanish Base Agreement* at 21, 27, 34-35, 38-39; *Hearings on Executive Agreements with Portugal and Bahrain* at 3-4, 34-35, 43, 71-72, 74.

⁴⁴ S. Rept. No. 91-129, 91st Cong., 1st Sess. 28 (1969).

I think it is pertinent in this connection to recall the comment of the Senate Foreign Relations Committee, in its 1969 Report on the National Commitments Resolution,⁴⁵ that:

Working through its traditional legislative processes, the Congress has the authority and the duty to reassert its constitutional authority to "declare war," "raise and support armies," "provide and maintain a navy," and "make rules for the government and regulation of the land and naval forces." If Congress makes clear that it intends to exercise these powers, it is most unlikely that the executive will fail to respect that intention.⁴⁶

Secretary Rogers has expressed his agreement with that conclusion.⁴⁷

Mr. Chairman, if Congress really believes that either the terms of particular agreements giving the United States this kind of option to use foreign facilities abroad, or the actual deployment of U.S. forces at particular locations, is undesirable, there is no question that Congress has extensive constitutional power to prevent our exercising that option, subject only to the limitation that it may not interfere with the carrying out by the President of responsibilities vested exclusively in him by the Constitution. Again, I repeat, no commitment is involved. Congress is free to exercise its constitutional powers and responsibilities. I would hope that, in deciding what action it should take, Congress would consider not only the specific facility or deployment in question but also the alternatives, and the political and economic costs of the alternatives, as well as the impact on our overall security posture. This is the approach taken by the executive branch in analyzing these issues, and I would hope Congress would resist the temptation to do it on a piecemeal basis. I think this is one more reason to avoid isolating the agreements as such for independent treatment.

I have serious reservations about the approach taken by Senator Case's bill⁴⁸ relative to the agreements with Portugal and Bahrain. That bill, as you know, seeks to compel the submission of those agreements for advice and consent to ratification by withholding the funds necessary for their implementation until they are so submitted. It seems to me that, if Congress considers the terms of the agreements unfavorable or wishes to preclude use of those facilities by U.S. forces, then it could certainly decide on those substantive grounds not to make the funds available. The executive branch, of course, feels strongly that the agreements are to our advantage and we will not hesitate to make our views known. But Congress clearly has the power to withhold the funds if it thinks that is the wisest course. Senator Case's bill, therefore, seems designed more to change the procedural situation than to augment the power of Congress to deal with deployment of U.S. forces under these agreements. I do not believe the approach is based upon a sound constitutional premise, and I must regretfully state our opposition to that bill.

⁴⁵ S. Res. 85, 91st Cong., 1st Sess. (1969).

⁴⁶ S. Rept. No. 91-129, 91st Cong., 1st Sess. 32 (1969).

⁴⁷ *Hearings before the Senate Committee on Foreign Relations on S. 731, S.J. Res. 18 and S.J. Res. 59, 92nd Cong., 1st Sess.* 501 (1971), hereinafter cited as *Hearings on War Powers Legislation*.

⁴⁸ S. 3447, 92nd Cong., 2d Sess. (1972).

V. EXECUTIVE AGREEMENTS GENERALLY: THE ERVIN BILL

Returning to the general question of the use of executive agreements, I would like to comment on the bill⁴⁹ which you, Mr. Chairman, have recently introduced. That bill would allow executive agreements to enter into force for the United States only after the expiration of 60 days of continuous session of Congress and unless disapproved by concurrent resolutions by both Houses of Congress. I think there are two kinds of objection to a bill of this sort, the first practical and the second constitutional.

On the practical side, the bill would seriously hamper the ability of the President to resolve certain international differences by agreement. It would require a "grace period" of at least 60 days, and even more if Congress were in continuous session during that time, before such international agreements could enter into force. This would be extremely disadvantageous in a number of situations in which a rapid resolution of practical problems is essential. Examples which immediately come to mind would be international agreements relating to the provision of disaster relief or other emergency assistance. There are a wide variety of practical matters, of greater or lesser urgency, which require international agreements, frequently through a simple exchange of diplomatic notes. These exchanges often deal with problems which arise suddenly in the course of day-to-day relations and which need to be resolved quickly to avoid disruption of on-going programs or cooperation. Our effectiveness as a government would be significantly impaired were we deprived of our ability to conclude and implement agreements on short notice.

Moreover, the bill would put the United States at a disadvantage in international negotiations. The ability to make firm agreements with immediate binding effect is frequently of critical importance in obtaining and formalizing concessions from other governments. No one who has ever been involved in any sort of complex negotiations—whether international or domestic—can fail to appreciate the delicacy of the compromises which are sometimes involved and the danger that agreements once negotiated can "come unraveled" if not concluded immediately. The bill which you have introduced, Mr. Chairman, would make it impossible for the Executive to prevent this from happening because other governments with which we negotiate could not be bound to any agreement until the United States was unconditionally bound—in this case, for at least 60 days. They would therefore be free to withdraw from such agreements if they believed that events had subsequently shifted in their favor. I do not believe it is difficult to see the disadvantage under which the United States would be forced to operate internationally.

Those are practical objections. From a constitutional point of view, as I have already indicated, I think it is clear that there are some agreements—though probably an extremely small number—which it is solely within the President's authority to conclude and with which the Congress may not constitutionally interfere. S. 3475

⁴⁹ S. 3475, 92nd Cong., 2nd Sess. (1972)

makes no exception for that category of agreement and is, I think, constitutionally objectionable on that ground.

Beyond that, however, even as to those agreements dealing with subjects over which Congress has clear constitutional authority, I believe it is doubtful whether Congress can constitutionally exercise that authority in the manner proposed by the bill, which, as I have indicated, affects not only the substance of the agreements but also the ability of the President effectively to carry out his function as negotiator. Even with respect to agreements which cannot be concluded or carried out without explicit authorization by Congress, I am not persuaded that it is constitutionally permissible for Congress to make that authorization conditional on the use of procedures which impair the President's ability to carry out his negotiating function.

Finally, with respect to agreements dealing with matters over which the Congress does possess constitutional authority, I think it is doubtful that Congress can exercise that authority by the device of a concurrent resolution not having the force of law. Such action by Congress would appear to violate the requirement of article I, section 7, of the Constitution that:

Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.⁵⁰

It seems clear that this provision applies to any resolution or other action constituting an exercise of the legislative powers of Congress.⁵¹

Of course, Congress has, in several instances in the past, conditioned explicit grants of statutory authority on the use of subsequent-approval mechanisms similar to that proposed here.⁵²

It has been argued that even in those situations the constitutionality of the advice is open to serious question.⁵³ But here we are dealing, not merely with a condition subsequent imposed in connection with a particular explicit grant of authority, but rather with a proposal to change the basic procedure by which Congress exercises its power to legislate with respect to certain Executive actions. I think it is relatively clear that Congress cannot, by a statute of gen-

⁵⁰ U.S. Const., Art. I, Sec. 7, Cl. 3.

⁵¹ Ginnane, *The Control of Federal Administration By Congressional Resolutions and Commissions*, 66 Harv. L. Rev. 569, 573 (1953).

⁵² See Section 123(d) of the Atomic Energy Act of 1954, as amended (42 U.S.C. Sec. 2153(d) (1970)). See also Ginnane, *supra* note 51 at 575-592.

⁵³ *Id.* at 593-599. Ginnane argues as follows:

"The result—and, indeed, the frankly stated purpose of—such provisions is to exclude the President from decisions of Congress which in their legal consequences are indistinguishable from statutes and which are seemingly the type of policy decisions which Article I, Section 7 requires to be submitted to the President. In brief, it is difficult to avoid the conclusion that the express purpose of the third paragraph of that section to insure that the President's role in the Legislative process should not be eliminated merely by giving legislative decisions another name would be thwarted by statutes which reserve final governmental decisions for determination as 'events' by Congress alone. (*Id.* at 595).

"The constitutional separation of powers reflects a purpose to prevent undue concentration of governmental power in either Congress or the President. It is at least arguable that to the extent that the administration of statutes is . . . made subject to approval or disapproval by congressional resolutions or committees, such as an undue concentration of power in Congress is created. (*Id.* at 611).

eral applicability, change existing constitutional procedures to enable itself to interfere in the future with particular Executive actions through a device of less constitutional stature than a full legislative act.

VI. RECOMMENDATION

Mr. Chairman, one year ago, in hearings before the Senate Foreign Relations Committee,⁵⁴ Secretary Rogers recognized the need for effective consultation between Congress and the President in exercising their shared powers. He stated that:

It is not only Congress that is weakened by a lack of consultation. Our Nation's foreign policy is itself weakened when it does not reflect continuing interaction and consultation between the two branches.⁵⁵

He said he would be prepared, if the Committee thought it would be helpful, to instruct each of the Assistant Secretaries responsible for the various geographic areas of the Department of State to provide the Committee on a regular basis with full briefings on developments in his particular area. The Secretary noted the need to act speedily, and sometimes without publicity, in crisis situations, and said we should try to find better institutional methods to keep these requirements from becoming an obstacle to Congress's exercising its full and proper role. He referred to suggestions which had been made in Congress for the establishment of a joint congressional committee which could act as a consultation body with the President in times of emergency, and expressed our willingness, if the Committee felt the idea had merit, to discuss it with them and determine how best we could cooperate.⁵⁶

Similarly, in connection with Senator Case's bill⁵⁷ relating to the transmittal to Congress of international agreements other than treaties, I stated last October our willingness to consider with the Congress practical arrangements to achieve the objective of that bill.⁵⁸ We believed that such arrangements would be more conducive than legislation to healthy and effective interaction between the two branches. While we still would very much welcome a willingness on the part of the relevant committees to consider cooperative arrangements in this area, the executive branch will not oppose that bill if Congress truly feels this is the wisest manner in which to proceed.

At the same time, as I have indicated, we are considering revision of our Circular 175 procedure and would welcome advice and counsel from this and other interested committees as to how that procedure might be improved.

There is no question of Congress' need for a continuing flow of information if it is to be in a position adequately to perform its functions in the field of foreign relations. We have suggested several ways in which we would be willing to help Congress meet that need. We have offered for consideration a number of possibilities for

⁵⁴ *Hearings on War Powers Legislation*.

⁵⁵ *Id.* at 501.

⁵⁶ Francis O. Wilcox, Dean of Johns Hopkins School of Advanced International Studies and a former Chief of Staff of the Senate Foreign Relations Committee, has suggested the creation of a "Joint Executive-Legislative Committee on National Security Affairs." Wilcox, Congress, the Executive and Foreign Policy 157 (1971).

⁵⁷ S. 596, 92nd Cong., 1st Sess.

⁵⁸ *Hearings on Transmittal of Executive Agreements to Congress* at 60-61.

improving the flow of information, as well as consultations, on important issues, and have indicated our willingness to consider other possibilities the committees may want to suggest. The committees have not, at least until now, indicated an interest in discussing such possibilities with us. The tendency, rather, has been to propose far-reaching legislation which takes little account of the complexities of the problems and which therefore tends to exaggerate rather than resolve the constitutional issues.

Mr. Chairman, we are trying to approach this whole range of issues with an open mind and a constructive attitude. We sincerely believe that if Congress will consider with us creative possibilities for reconciling the constitutional relationship between the two branches with the practical realities of the late 20 century, both the Congress and the Executive will be better able to serve the American people.

Thank you, Mr. Chairman.

Senator ERVIN. I want to compliment you on an all-inclusive paper. I will have to confess I find some difficulty in seeing it as an undue hampering of the power of the President to negotiate an agreement where such an agreement involves the constitutional powers of Congress. In such a case the President would be an agent performing essentially a congressional mission, and Congress could prescribe any procedures by which a President would exercise his agency.

For example, Congress has undoubtedly power of the purse. Why would it hamper the President in negotiating a foreign aid agreement for Congress to have the power to prescribe a procedure which specifies that this foreign aid agreement is not to be valid unless it lies before Congress for 60 days? In other words, if the power involves a congressional power, the President is in essence acting as an agent of the Congress in negotiating such an agreement, so why should he have an unrestricted power to negotiate an agreement? Why should he not be required to in effect, tell a foreign nation that an agreement will not be effective until it lies before Congress for 60 days without being disapproved by Congress?

Mr. STEVENSON. I think it depends to a certain extent on the type of agreement we are dealing with. Now, clearly agreements which do involve congressional action to fund the obligations are made subject to appropriate congressional action. But normally you have an agreement which can be otherwise effective as to other concerns, and so you only have the need for the congressional appropriating or other action.

If the present bill were in effect, you in a sense would have a two-step procedure. You would first have to have it tabled before for Congress for this period which, of course, if Congress were not in session, could be in excess of 60 days, and then in addition you would have to have the further step of the additional appropriating or other action.

It seems to me that it is the same sort of thing that you have in private practice in many situations, where certain types of agreements can be more effectively negotiated if you authorize your negotiators ahead of time to reach a final settlement, and do not impose

upon them the requirement of having a further period of time in which the principals can consider the agreement.

Now, clearly Congress can ahead of time prescribe the parameters of that discretion that they want to give to the negotiators.

Senator ERVIN. Isn't that in essence that this bill attempts to say to the President? You cannot negotiate—I am leaving out of consideration the very narrow field in which the President may have under constitutional power to make an executive agreement without the Congress having anything whatever to say about the matter, but isn't Congress saying by law, if this bill were to be passed, that the President cannot make an agreement—he cannot negotiate an agreement which is in the form of an executive agreement which will be binding on the Congress, where it is necessary to call upon the Congress to act in this field, unless it has been placed before Congress for 60 days. Is that essentially what this bill is?

Mr. STEVENSON. Well, it seem to me, Senator, we are dealing with two different questions. It seems to me from a negotiating standpoint that it is definitely advantageous in some circumstances for the negotiators to be able to enter into a binding agreement.

Now, this is not to say that they should be able to go beyond the authority that Congress has given them. They shouldn't, and that would be an encroachment on Congress' powers and I think for this reason we quite appreciate why Congress and the relevant committees are interested in seeing the agreements that have been entered into pursuant to this authority, and it seems to me Congress can circumscribe that authority the way it wants to. But if in a case where the negotiators have carefully stayed within the authority that Congress has given to them—

Senator ERVIN. There wouldn't be any trouble in that case, where the law then limits the authority, there is no trouble between a master and his agent where the agent stays within the limits of his authority.

Mr. STEVENSON. But it seems to me, Senator, that the bill goes further than that. If the bill were in effect, Congress could in effect change that authority. They wouldn't have to limit themselves to passing a concurrent resolution where they felt the agents had exceeded their authority. They could do it if for some reason they changed their minds about the situation.

Senator ERVIN. Of course, there is no room for any disagreement or controversy or difference of opinion, I will put it, where Congress in advance authorizes the Executive to do certain things, either by treaty or by an executive agreement. However, as I construe your statement, from the practical standpoint in all respects and from a constitutional standpoint in many respects, Congress should not restrict the power of the President, in any way, to negotiate an agreement which cannot possibly be carried out without the subsequent approval of Congress under the Constitution.

Now, if I have construed your views wrong, I would like them to be set right.

Mr. STEVENSON. Well, it seems to me there are many different types of executive agreements that we are talking about. You yourself referred to the very special case of agreements which are within

the President's independent power. There are a very limited number which do not require any action by Congress either before or afterward.

I would have trouble constitutionally with applying any legislation to these.

Now, as to the other types of executive agreements, they are either authorized by Congress beforehand or congressional action is required subsequently.

As to the first, it seems to me that the reason Congress has decided to authorize the action ahead of time is that it would like to see these agreements concluded under the most favorable negotiating circumstances, and it seems to us in these executive branch that it is advantageous to be able to enter into a binding agreement without this second step.

Now, to the extent that the Executive exceeds that authority, I think the Executive is at fault. I think a reporting requirement such as we suggested we would like to work out on a more effective basis—in fact, most executive agreements are already reported—or the Case bill, would certainly make sure that Congress could check up on whether or not the authority had been exceeded.

Now, with respect to those agreements which require additional action, and therefore have to be negotiated subject to that action, it seems to me you will have the congressional second look anyway, because you will have to, at the time the appropriations action is taken or whatever the other implementing action is taken to take a decision, so it doesn't seem to me you need this approach in those cases.

Senator ERVIN. Well, in the long run, would it not promote better relations with foreign governments, which may be ignorant of our constitutional process, to have a statute that say that this agreement must lie before Congress for 60 days before it becomes valid? Then they can know in advance that the agreement is not valid. In other words, your position, as I would see it, says that Congress must not take any action in advance. Congress must wait until the Executive calls on Congress to exercise congressional powers to implement the agreement, and then it must repudiate the agreement if it is not in harmony with it.

Mr. STEVENSON. Well, I think the problem I have, Senator, is that it seems to me it has to be a two-way street. We cannot say to a foreign government this agreement is fine and we accept it but it can't enter into effect, we won't be bound by it until our Congress has another look at it. Even though we feel it has been authorized by what Congress previously did, we can't commit ourselves until it is laid before Congress for 60 days. Well, they will say, well, all right, but then obviously we are not making any commitment and they can then change their minds just as Congress can change its mind.

Senator ERVIN. That is true, but I don't see the two-way street. It seems to me that when the executive agreement cannot constitutionally be implemented without subsequent congressional action, that this leaves Congress in the position it has no way to travel except let our country fall into an abyss, not traveling a two-way road but a dead end road.

In other words, that is the one thing the Members of Congress feel so strongly about concerning these bases agreements, that here the President goes and obligates the American people, the American Nation, or the United States, to do certain things in return for bases and it leaves the Congress where the only remedy is to say we just refuse to carry out the agreement the President has made, and it seems to me that is a rather poor way to run a government or a railroad, either one.

Mr. STEVENSON. Well, I agree with your recent statement where there is a situation requiring additional congressional action and it is not a situation where you have previously authorized the executive branch, as in the case of a trade agreement or postal agreement where you have said, all right, go out and make these agreements and that is all that has to be done.

But where it is a base agreement, for example, that requires certain additional funds or other congressional action, I think that our negotiators are being irresponsible if they would negotiate such an agreement without saying that it is subject to appropriate congressional action in those areas, and therefore clearly the agreement could not become completely effective until that action were taken.

But I think my point is on those agreements Congress is already protected because you have to come back to Congress and you at that point can decide if you don't want to appropriate the funds or to go forward.

Senator ERVIN. Yes, but that puts Congress in quite a bind because Congress has to stand up in the face of the world and say to the President, say to the foreign nation, we don't agree with the President in this executive agreement which calls upon us, before it has constitutional effect, to exercise certain powers the Constitution gives us. So we are left in a position where we have to repudiate the President's action in the presence of the whole world and it seems to me that some method of letting the President know the extent of his authority or how far he is going to be supported in advance would be helpful in our diplomatic relations instead of harmful.

Mr. STEVENSON. Well, it seems to me, Senator, that certainly as a legal matter, where the agreement was negotiated the way it should be, being made subject to whatever additional congressional action is required (that is one of the terms of the agreement and the other country accepts that), it has to accept the possibility that Congress will not appropriate the funds or take the other necessary action. That seems to be much less serious than what could happen under this present bill because under this present bill you could have an agreement, say, a trade agreement or postal agreement which is something clearly within the powers you have given the negotiators, they go ahead and negotiate it, and then they come back and Congress passes a concurring resolution saying, no, we don't want that to go into effect. It seems to me that is a more direct repudiation because here they were acting within their authority, yet you have in effect changed that authority.

Senator ERVIN. Well, as a practical matter, the views that you express would almost compel Congress to go along with the President's agreement regardless of whether the Congress thought it was

wise or not. It is sort of like a man's wife going out and buying goods on credit that the husband doesn't think she ought to buy. He could hardly tell the tradesman who sold his wife the goods on credit, I am not going to honor my wife's obligations. It puts him in an impossible situation if he has an unwise and extravagant wife and your position as I see it puts the Congress in exactly the same unfortunate position.

Mr. STEVENSON. Well, my own view, Senator, is that you would be in a more difficult position in the practical carrying out of the present bill than we are under the existing situation. I don't say the existing situation has always been perfect but it seems to me the Congress does have capacity to deal with it and will have that capacity even more if more effective reporting procedures are carried out.

Senator ERVIN. I understand you to take the position that Senator Case's bill, which requires the submission of some of these agreements, in the form of a treaty, or Congress will withhold funds, is unconstitutional, am I correct?

Mr. STEVENSON. Well, of course, Senator Case's bill requiring that these agreements be approved as treaties or the funds will not be appropriated seems to me unnecessary from the standpoint of Congress if Congress disagrees with these agreements as a substantive matter. In each case, it was made clear that the agreements were subject to congressional action, action with respect to the necessary funds, so I think Congress doesn't, as a legal matter, either constitutionally or internationally, to provide those funds. And it also seems to us that it would not be desirable to have those agreements adopted as treaties because this would imply a political type of commitment which we very carefully wished to avoid. We didn't want to make any commitment to defend The Azores or any commitments as far as the defense of Bahrein. We simply wanted the right to use those facilities.

Senator ERVIN. But your position allows Congress no choice as I see it. If the President were to submit these agreements in the form of a treaty, then, during the debate, the Senate can advise as well as consent. If the agreement is not submitted as a treaty, but as an executive agreement, the only power Congress would have would be just to refuse to carry out the agreement or consent to it.

Mr. STEVENSON. Well, I think the executive branch would be irresponsible, and I don't think we have been, if additional congressional action is required and we don't put in the agreement that it is subject to that action.

Now, if that is put in, I don't see it is a repudiation. It is something that all parties acknowledge, that since Congress hadn't acted beforehand, it had a right to consider this later on.

Senator ERVIN. Unfortunately, the Constitution itself doesn't say what has to be put in the form of an agreement. I can see a constitutional objection that flatly said to the President, we will invalidate agreements you have the power to make. I can see a constitutional objection to that but I can't see it to the other matters. And I can certainly say, as a practical matter, it is more convenient to the negotiator to go out and present to the world a theory that he has

got absolute power to make any agreement he wishes to without divulging the limitations on his authority, but I don't see where it helps our system of government very much unless you believe that the constitutional powers should be unduly weighted in favor of the Executive and against the Congress.

Another matter concerns me—I read a statement in the paper by General Wheeler, I believe it was, to the effect that other countries would accept it as a more binding commitment for American government to make agreements to station troops in the country than it would to have some written documents to that effect in the form of a treaty. That is not exactly what he said but that is what it meant to me. When the Executive makes an agreement to station troops in a country, those troops might come under attack. If those troops are attacked, we will have to repel the action from some other nation. For this reason I think it would be wise for the Executive under agreements of this kind to submit them in the form of a treaty.

Mr. STEVENSON. Well, this question, as you said, has been one of the most difficult problems that lawyers in the executive branch and in the Congress have wrestled with, as to what should be the appropriate scope for treaties as opposed to executive agreements. Of course, you are familiar with our 175 procedure and additional attempts to define those cases where we would insist that the treaty form be used. As I said, we are currently in the process of attempting to reconsider this again to try to make our approach to this problem more meaningful and we would certainly respect and appreciate any of your views.

Senator ERVIN. I also have a little difficulty accepting the theory that the President is the only person who can prescribe the procedures by which executive treaties are to be made because the necessary and proper clause of Section 8 of Article 1 says:

The Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

For example, consider the situation involved in the *Pink* and the *Belmont* cases. I don't see why Congress would lack the constitutional power to say that those agreements should be filed with the Congress before they become finally effective, or at least made known to the Congress. I don't believe the Constitution intends the President to make executive agreements which have the force of law as they did in those cases in secrecy. I would think that the Congress would still be authorized under the necessary and proper clause to set up a procedure which would require that the agreements be made public, or it could undertake to invalidate them if they were not made public.

Mr. STEVENSON. I think, Senator, the question of the meaning of the necessary and proper clause in this context is a difficult question. I think on the one hand it is entirely clear as you pointed out that it is not limited to doing what is necessary and proper with respect to Congress' powers. It specifically refers to other powers.

On the other hand, clearly we have as a basic principle of our Constitution the separation of powers principle and the necessary

and proper clause if abused could in effect override this principle. The attempt was made to override what were clearly presidential powers in the *Myers* case, where Congress attempted to in effect regulate the President's powers to dismiss a Federal official and in some of the other cases where Congress in effect tried to limit the President's power to give pardons.

So I think surely Congress does have a role if what it is doing implements the President's power.

On the other hand, if it uses the necessary and proper clause as a way of taking away what is meant to be the President's power, then I have problems.

Now, of course, there are many areas where the powers are shared and clearly the clause can have a very definite role there.

Senator ERVIN. I don't disagree with you in the idea that Congress cannot under the necessary and proper clause deny the President the power to exercise his constitutional power to make executive agreements in a limited number of cases, but I think Congress can provide procedures by which those powers could be exercised insofar as those procedures are reasonable and do not deny him in the end the right to exercise those powers.

For example, in the *Meyers* case, I think if Congress had had a role, Congress could pass a valid law under the necessary and proper clause to say that, before a presidential appointee who has been confirmed by the Senate can be denied the right to draw his salary, the President must make a public announcement of the fact that he has removed him from office.

Mr. STEVENSON. Well, the case that gives me particular concern, Senator, would be the case of one of these agreements within the President's individual powers. As I say, there are very few. Say an armistice agreement or perhaps this agreement that they are currently negotiating on incidents at sea that is clearly within the Commander-in-Chief power.

It seems to me a requirement that that agreement cannot become effective without Congress having not acted for 60 days, or to put it differently, that Congress could prevent that agreement from becoming effective by taking action, does not merely implement the President's power but takes away his power because otherwise he could have had an agreement while if this is law, he wouldn't have an agreement.

Senator ERVIN. I am constrained to agree with you on that. I don't think Congress could prescribe procedures that had the effect of preventing the President from exercising his powers but I think Congress could prescribe procedures which would require that agreement be made public.

Mr. STEVENSON. Well, as I indicated, we are not opposed to the Case bill requiring the transmittal of executive agreements to the Congress. We thought we could achieve the same objectives through other procedures.

Senator ERVIN. I have to be on the Senate floor at 12:30. I know there are some questions that other questioners would like to ask. I have finished mine, I hope. I am sorry it took so long because you have presented a very fine paper. If you will pardon me for saying

so, I think you are an advocate for the Department which you are in, and although we disagree on many points, I think you have presented the case for the Department of State, well, which you should, as an advocate.

Mr. STEVENSON. I think you have promoted me, Senator, because Senator Fulbright called me a house counsel and I would rather be an advocate.

Senator ERVIN. I think you make about as fine an advocacy for the position of the power of the Executive and the weakness of the Congress in this field to be made, because I think you leave us just one method for protecting ourselves, and our powers. That method is to repudiate something the Executive has already done and that, to refer to my previous example, is like the man who refuses to pay his wife's bill. It puts us in a rather embarrassing position.

Can you come back at 2:30?

Mr. STEVENSON. Yes, sir. [Mr. Stevenson's testimony resumes at page 279, *infra*.]

Senator ERVIN. Then the committee will stand in recess until 2:30.

(Whereupon, at 12:30 p.m., the hearing was recessed to reconvene at 2:30 p.m. the same day.)

AFTERNOON SESSION

Senator ERVIN. The committee will come to order and counsel will call the next witness.

Mr. EDMISTEN. Mr. Chairman, we are honored to have Prof. Henry Field Haviland, who is Professor of International Politics at the Fletcher School of Law and Diplomacy of Tufts University.

STATEMENT OF PROF. H. FIELD HAVILAND, FLETCHER SCHOOL OF LAW AND DIPLOMACY, TUFTS UNIVERSITY

Senator ERVIN. I want to thank you for your presence and your willingness to give us the benefit of your views on this very important question.

Professor HAVILAND. Thank you, Senator.

I am glad to be here and I appreciate the invitation.

If I may, I should like to read my statement which is reasonably brief and I think will help to convey my thoughts in the most efficient way possible.

Senator ERVIN. That will be entirely satisfactory.

Professor HAVILAND. The present concern regarding the increased use of executive agreements in lieu of treaties is only one aspect of a broader and deeper agitation regarding the general state of health of executive-legislative relations. If one could reduce the fever of the general situation, one would surely alleviate the treaty ailment. And, if one does not deal with the causes of the broader distress, concentration primarily on the treaty issue is likely to produce only limited relief.

Thus I should like, first, to make a few observations about the general condition of the interbranch relationship before focusing more specifically on the treaty question.

STATE OF INTERBRANCH RELATIONS

At the outset, we should remind ourselves what an unusual contrivance our separation of powers system is, especially the extraordinary degree of autonomy bestowed upon each of the three branches. And it is a tribute to our Nation that we have made the system work as well as we have—much to the amazement of friend and foe alike. Nonetheless, certain current foreign policy issues, particularly Vietnam, have severely strained the relationship and have raised serious questions about its future.

Underlying these current storms are certain long term currents which tend to exacerbate a relationship which has never been easy. On the one hand, because today's foreign relations play a much more important role in our national life and require a far greater commitment of resources, both human and material, both houses of Congress have become involved in almost all issues of foreign policy, whether they concern Vietnam, China, the Soviet Union, NATO, the United Nations, arms control, trade, foreign aid, the Middle East, Latin America, or South Africa.

At the same time, other developments have made it increasingly difficult for the Congress to fulfill its new responsibilities adequately. The tremendous volume and complexity of foreign affairs made it impossible for Congressmen or their modest staffs to keep abreast of more than a small portion of the flood of external business. Not only is the relevant information massive and complex, but it is often hidden behind the pervasive fog of secrecy.

The organization of Congress itself leaves much to be desired with its extreme decentralization among houses, parties, committees, and individual members. And the accelerating pace of international relations requires not only more but faster decisions. All of these factors have tended to strengthen the role of the executive branch in relation to the Congress and to increase the tension between the two branches.

These trends pose the paradoxical challenge that close executive-legislative collaboration is more essential than ever before—and yet more difficult.

NEED FOR IMPROVED COLLABORATION

What, then, should be the general strategy for improving this situation, including possible revision of the treaty system?

The key imperative, it seems to me, is that every practical measure be taken by both branches to facilitate regular, systematic and full consultation on all major foreign policy issues. This is not primarily a question of constitutional or organizational revision but of fundamental reorientation of basic political concepts and practices.

There are those, of course, who argue against increasing executive-legislative interdependence, not only on the ground that the Constitution and tradition have supported a uniquely dominant role for the executive but that the current trends, referred to earlier, further reinforce the leadership of the executive.

I believe, however, that there are equally cogent reasons why special efforts should be made to strengthen the relationship between

the two branches, especially by reinforcing the role of the Congress. It is clear that in today's world the support of Congress is essential for the success of administration policy in most foreign policy areas, and the Congress has powerful sanctions to compel executive cooperation. Better this cooperation be early and willing than late and forced. The executive should recognize that it needs, and can benefit from, the unique assets of the Congress, particularly the special relationship between its Members and their constituencies. At the same time, the Congress has the responsibility to concentrate on the larger issues, not minutiae, to use its deliberations for serious analysis, not mean politicking, to make its organization and procedures more efficient and democratic, and to observe legitimate requirements of secrecy. This does not require any guarantee of automatic agreement between the branches or the parties—only the obligation of regular, systematic and full consultation between the branches and the parties.

If this approach seems to be a counsel of perfection to be expected only in some distant Utopia, let me say that it is no more than has already been achieved by some of our wiser statesmen on certain occasions in the past. The classic example is the role played by Senator Arthur Vandenberg in cooperating with the Democratic administrations of Presidents Roosevelt and Truman to establish the United Nations, the Marshall Plan, and NATO.

Against this background, what should be our policy regarding the widespread use of executive agreements in lieu of treaties?

THE CASE FOR TREATIES

It is not necessary to review here what is enshrined in every civics textbook: the rationale for the original treaty provisions of the Constitution. Those who continue to defend the treaty procedure argue that nothing has changed the logic or letter of the Constitution, that all significant international agreements should be dealt with as treaties, that legislative participation is more essential than ever before, and that the Senate is the preferable legislative partner in the process because of its smaller size, longer tenure, and greater experience in such matters.

Increasingly, however, a growing body of public opinion has become persuaded that the treaty procedure is not well suited to today's circumstances. There are those who argue that the volume, complexity, sensitivity and pace of contemporary foreign affairs make it difficult and undesirable for the Congress to participate in considering international agreements to the extent anticipated in the Constitution. To the degree that the Congress should be a partner in the process, it is argued that the House of Representatives has as good a claim to this role as the Senate. Furthermore, the requirement of a two-thirds majority, which gives extraordinary blocking power to the representatives of as small a portion of the country as 7 percent of our population, seems unduly restrictive. While most commentators on this subject would not favor repealing the constitutional treaty provisions, many prefer that the treaty procedure be reserved for only the most significant international agreements which are likely to have the most crucial consequences for U.S.

society and therefore call for extraordinary popular support. The great majority of agreements, however, dealing with less momentous matters, do not justify this procedure and are better dealt with by a less restrictive and more flexible procedure, preferably involving both Houses of Congress acting by simple majority vote.

RISE OF THE EXECUTIVE AGREEMENT

Practice and law have followed this route, largely via the evolution of the executive agreement procedure. It is not necessary here to repeat the history of this development, including the intricate and controversial legal arguments pro and con. Suffice it to say that the executive branch has resorted increasingly to the use of executive agreements, especially since the Second World War, and that the great majority of expert observers concur that such agreements, as well as less formal executive commitments, have essentially the same legal authority as treaties.

Those who support this trend, especially the denizens of the executive branch, justify their position by arguing that executive agreements are more appropriate for less critical matters, provide a more efficient means of dealing with a large volume of transactions, protect secret information more effectively, frequently involve legislative endorsement either by prior, concurrent, or subsequent approval, and, when they receive such legislative blessing, are more democratic because they involve both Houses and are dealt with by simple majority rule.

In attempting to establish some boundary between treaties and executive agreements, the Department of State has said that it restricts the use of nontreaty agreements to those made in accordance with: (a) existing legislation or treaty, (b) congressional approval or implementation, or (c) the President's constitutional power. It is not surprising that the Congress has been less than satisfied with this Delphic language. And I suspect that it will be difficult ever to formulate much more precise guidelines which will be acceptable at both ends of Pennsylvania Avenue.

The weight of expert opinion supports the view that the President's authority to engage in executive agreements and other less formal international commitments flows not only from his constitutional authority but from his general executive responsibilities and is not necessarily dependent on legislative approval. Hence, it is doubtful that Congress can legally contravene this authority without the President's consent or constitutional amendment.

Aside from the question of legality, however, what would seem to be desirable and feasible? I suggest that the objective to be emphasized is to strengthen executive-legislative collaboration, for the reasons stated earlier, by maximizing the participation of both houses of Congress, acting by simple majority, in processing all executive agreements.

PROPOSED STANDARDS AND PROCEDURES

While we have seen that it is difficult to formulate any absolutely precise guidelines to govern such interbranch collaboration, the situ-

ation can be improved by a combination of general standards and consultative procedures to help interpret those standards.

In thinking about appropriate guidelines, I favor the current practice of reserving the treaty procedure for relatively rare agreements of exceptional significance calling for extraordinary popular support. For other accords, I suggest that the normal procedure should be to submit them all as executive agreements to both houses of Congress for their review and approval.

If the President contends that some agreements are too sensitive to be exposed to general review, it is possible to adopt special security safeguards such as those proposed in Senator Ervin's bill S. 3475. It may still be possible, however, that the Chief Executive will insist on withholding certain agreements from legislative scrutiny for reasons of security or other exceptional circumstances. Because we have seen such executive privilege grossly abused in the past, I should hope that everything possible would be done to discourage such exceptions. Nonetheless, they are not only possible but legal. Thus it would seem appropriate to consider providing for such exceptions, hopefully with the consent of Congress.

Words do not interpret themselves, however. There should be some regular consultative procedures to facilitate systematic and full communication between the two branches regarding all phases of processing both treaties and executive agreements, from planning to implementation, and especially for dealing with exceptional cases. Participation in such consultation could vary according to subject matter and other considerations. The process would be greatly facilitated, however, if it were linked to an arrangement for continuing dialogue between the key foreign policy leadership of both branches, including bipartisan representation from relevant committees of both houses. Such consultation could not entirely eliminate friction between the two branches, but it could reduce it substantially.

PROCEDURES FOR CONGRESSIONAL APPROVAL

When executive agreements are submitted to the Congress, should they be given positive approval by majority vote or should they become effective automatically unless voted down by majority vote, as proposed in S. 3475? Positive majority endorsement is the normal legislative procedure, and there is no logical reason why it should not be applied in the case of executive agreements. On tactical grounds, however, because the procedure of automatic passage, unless voided by negative majority, seems kinder to the executive, this approach is more likely to win executive cooperation. Furthermore, such a procedure makes it easier to process numerous minor agreements without specific action by the Congress.

If the latter system is adopted, is the proposed 60-day review period too long, too short, or just right? Of course, there can be no categorical answer to this question. An impatient President might argue for faster action in some cases, or either branch might want more time for deliberation in other cases. It would seem desirable, therefore, for the Congress to be prepared to consider and accommodate occasional exceptions regarding the duration of legislative review.

CONCLUSIONS

To summarize my thoughts, a central theme that deserves emphasis is that the treaty problem is only one aspect of the profound tension which has developed in recent times between the two branches, and that problem can be dealt with effectively only as part of a broader strategy to improve the basic relationship. At the root of the situation is the need for a fundamental revision of concepts and practices on both sides which will encourage and facilitate more regular, systematic, comprehensive and bipartisan consultation between the executive and legislature.

To make this work, the Congress as well as the Executive, need to improve their internal functioning, including more effective concentration on the analysis of key issues, better coordination among the relevant components of each branch, more adequate bipartisan consultation, and more efficient and democratic procedures. This approach is not an impractical dream but is a realistic possibility calling for no more than the exercise of courageous and patient statesmanship which has been practiced on past occasions and could be practiced again.

With regard to the specific problem before us, there is no question that the negotiation of executive agreements with only minimal legislative participation has been carried too far, and that there is need for correcting the balance. I have suggested that the traditional treaty procedure is not as well suited to contemporary circumstances as it seemed two centuries ago and should be reserved primarily for a relatively small number of accords which are regarded as of extraordinary significance and worthy of overwhelming public approval. The more typical situations should be handled as executive agreements submitted for review by both houses of Congress acting by majority rule. The provisions of S. 3475 would make it possible for the Congress to handle a large volume of such agreements with a minimum of formal action and within relatively short periods of time.

Although the President has the legal authority to negotiate such agreements without express legislative approval, the growing involvement of Congress in foreign affairs and the general desirability of democratic participation and support argue that the President should accept the maximum degree of legislative partnership possible. In the rare case of exceptionally sensitive agreements, S. 3475 would seem to provide reasonable safeguards.

Thank you.

Senator ERVIN. We have a procedure to which you have alluded by which Congress has delegated to the President certain powers such as the power to reorganize the executive departments and agencies, and providing that they should have legal effect unless they are vetoed by one or the other of the two houses of Congress within a limited period of time.

Now, despite the fact that we have had some constitutional objections voiced to us this morning by the counsel for the Department of State it seems to me it is constitutionally permissible, with the exception of those few areas in which the President has constitutional power to make executive agreements which are binding with-

out consultation of Congress, for Congress to have, in this bill, a procedure similar to the executive reorganization procedure, that would enable Congress to at least know what is going on and to automatically approve the great majority of executive agreements without any great difficulty and reserve itself power to nullify or disapprove of a limited number of executive agreements.

Do you have any constitutional qualms on that question?

Professor HAVILAND. Not a bit, Senator. I think both on democratic grounds and on legal grounds that seems to be a sensible and constructive proposal. As I said in my statement, I think it behooves the executive branch to accept and, as a matter of fact, welcome the maximum degree of legislative participation possible, especially if this can be done without excessive delay or the imposition of unreasonable obstacles. I think your procedure is reasonable on that score. The only place where I think the picture is a bit hazy is, as you well know, according to law and tradition, the boundary which determines where the President can act by executive agreements without specific legislative concurrence. I think one can make a good case, as I mention in my statement, that legally he probably can make any executive agreement without specific legislative authorization, but I think you are quite within your rights, and it is a constructive act, to propose your system. I am urging that the Executive accept that system.

Senator ERVIN. The testimony of Mr. Stevenson this morning is to the effect that as he put it, 97 percent of all executive agreements are either based on some prior treaty or some prior authorization of the Congress or called for congressional implementation by subsequent legislation. For that reason, I have found it very difficult to accept the theory that setting up machinery that would provide for congressional review of these matters, is beyond the constitutional power of Congress.

Professor HAVILAND. I agree with you.

Senator ERVIN. I agree with your opening observation that the controversy between the Congress and Executive with respect to the constitutionality and desirability of executive agreements is just a part of a general unfortunate conflict which has developed between the two branches during recent years in a number of aspects. I attribute part to the fact that during recent years we have had a tendency on the part of Presidents of the both political parties to isolate themselves more or less from the regular departments and agencies of the Government by appointing smaller groups as substitutes to advise them in particular areas heretofore committed to the departments of the Government. From my observation we have so many men who accept these positions close to the President, and particularly those whom those men call upon to assist them in the performance of their duties, who come from business without previous experience in Government and without very much previous study of governmental processes. I think that causes a good deal of this friction because a businessman is sort of like the Centurion in the Bible who is accustomed to saying to one man come and he comes, and to another man go and he goes. He has the same tendency to try to deal in like manner with that political animal we call a Congressman and the two systems just cannot be reconciled; that

system will not work with a political animal like the Congressman.

Professor HAVILAND. I think that you are quite right and I do not think meetings of stockholders are quite the same thing as the Congress.

Senator ERVIN. That is right.

Professor HAVILAND. I wonder, Senator, however, whether you might also agree with the statement that I included in this document, that possibly some fault also lies with Congress?

Senator ERVIN. Oh, yes. Yes. I think, unfortunately, all too often those of us in Congress tend to succumb to temptations to apply a little politics with foreign policy, and sometimes in respect to rather trivial and inconsequential matters rather than matters of real substance.

Professor HAVILAND. I am glad to hear you say that.

Senator ERVIN. So I think that—

Professor HAVILAND. That is a courageous statement.

Senator ERVIN. So I think the fault is on both sides.

I want to thank you for a most illuminating statement and also for the fact that you place emphasis on the fact that that, after all, history shows that within times past we have been able to have in critical periods very fine collaboration between the executive and the legislative branches of the Government. That is more or less essential if you are going to have smooth operation of Government in the foreign policy field.

Professor KURLAND. Mr. Haviland, if I may, I am somewhat bothered by paragraph 3 on page 4 of your document. It says that:

The weight of expert opinion supports the view that the President's authority to engage in executive agreements and other less formal international commitments flows not only from his constitutional authority but from his general executive responsibilities and is not necessarily dependent on legislative approval. Hence, it is doubtful that Congress can legally contravene this authority—power to make executive agreements—"without the President's consent or constitutional amendment.

Now, by the President's consent do you mean his failure to veto legislation or do you mean that Congress needs the consent of the executive branch to legislate in an area in which the President either has or is thinking of or might engage in making of an executive agreement?

Professor HAVILAND. What I meant to emphasize here is that I believe it is the view of the majority of competent specialists in this field that the President does have the authority to engage in executive agreements with other countries without necessarily getting the specific approval of Congress.

Professor KURLAND. Suppose Congress forbids him to engage, to make an executive agreement on a particular subject?

Professor HAVILAND. I am sorry, I did not hear.

Professor KURLAND. Suppose Congress passes legislation forbidding him to make an executive agreement on a particular subject.

Professor HAVILAND. I would have to bow to more competent constitutional lawyers than I. I am a political scientist, not a constitutional lawyer. I do not know where the best minds in that field would come out on that. It is my understanding that the President does have authority to make executive agreements without specific

authority of Congress. If Congress specifically forbade him to engage in an agreement, I myself am not certain on constitutional grounds whether they could prevent him from making such an agreement or not. I should think the lawyers on the Executive side could make a good case that, if he could prove that his authority was in accordance with the Constitution, he could go ahead and make that agreement.

Professor KURLAND. If they are——

Professor HAVILAND. It is true——

Professor KURLAND. They could prove to the contrary.

Professor HAVILAND. And I think we are clear on the point that Congress through domestic legislation can prevent the implementation of that agreement within the country.

Professor KURLAND. My problem was the proposition that the subject matter of Presidential agreements is not within the role of Congress. Obviously to engage in empty agreements, there is no reason why Congress should bother to prevent that kind of activity.

But I must say I take exception to the proposition that Congress can not legally contravene his authority without the President's consent or constitutional amendment. I should think it would be a very narrow area indeed in which the President is authorized by the Constitution itself.

Professor HAVILAND. Are you saying that the Constitution does provide a limited amount of authority to the President to engage in agreements without the specific approval of Congress?

Professor KURLAND. Well, the area it seems to me has not yet been defined. It is conceded by everybody so far to be narrow. Generally it has been conceded as capacity for recognition of foreign governments is entirely within this control although this morning Mr. Katzenbach suggested legislation that that be subject to limitation by Congressional action.

I have the same kind of problem with your reference to executive privilege which is on the bottom of page 4 of your statement and carries over to page 5. You suggest that the Chief Executive can withhold certain agreements from legislative scrutiny and indeed that to do so is not only possible but legal. We have had several sessions of this subcommittee on the question of where this authority, if it exists, comes from. I do not think that this subcommittee has yet been satisfied the Constitution authorizes or refuses to provide information to the legislature.

Professor HAVILAND. Certainly there is no specific language in the Constitution to that effect. It seems to me that the implied power, that we have already discussed, to engage in Executive agreements without explicit Congressional authority, and also in other kinds of cases the authority which he has exercised to withhold information from the Congress where he thought it necessary and within his power. Because of those precedents, I think——

Professor KURLAND. He could engage in this practice. By "he" I mean the large succession of officials who have occupied that office.

You would support S. 2475 except for the possibility of changing the period in which the Executive agreement would have to lie on the table and in terms of perhaps broadening the method of determining what agreements need not be supplied, is that right?

Professor HAVILAND. I would generally support S. 3475 and in fact I have not recommended any specific language change on the 60-day period. I merely raise the point, as I am sure you have already taken into account, that you might want to make some exceptions regarding that period. Of course, the Congress could always do that.

Professor KURLAND. Those are the two places in which you raise questions about the bill. With regard to all other matters you have no problems?

Professor HAVILAND. No, I do not.

Professor KURLAND. Thank you, sir.

Mr. EDMISTEN. Professor Haviland, would you find it unduly harsh if this bill provided that one house could disapprove of an agreement in this bill?

Professor HAVILAND. I am sorry, I did not understand the question.

Mr. EDMISTEN. Would you consider the bill unduly harsh if it provided that one house alone could disapprove of Executive agreements?

Professor HAVILAND. I must confess I have not thought that one through. My offhand comment is yes. I think it would be unduly harsh. I would prefer to have both houses do it. But I really have not given that enough consideration.

Mr. EDMISTEN. We have heard some talk during these hearings that this bill would unduly hamper the executive branch of the Government in the conduct of foreign affairs. Do you believe that to be true?

Professor HAVILAND. No.

Mr. EDMISTEN. Now, it was mentioned this morning by Mr. Stevenson that the 60-day period during which the bill would lie on the table in Congress could perhaps work havoc in situations in which a very touchy international agreement was being negotiated. But, when treaties are being negotiated, the countries of the world understand, do they not, that it is subject to approval by the Senate?

Professor HAVILAND. In an overwhelming percentage of cases time would not be so pressing that you couldn't take at least 60 days, if not more. The sort of thing I had in mind when I raised this question about the time period and when I anticipated the possibility in rare cases of possibly shortening that period had to do with extreme emergencies requiring very rapid decisions, but I would think those situations would be extremely rare.

Mr. EDMISTEN. I think the bill could be amended to take care of a situation like that

Professor HAVILAND. Exactly.

Senator ERVIN. The President could request.

Professor HAVILAND. Exactly.

Mr. EDMISTEN. That is all I have.

Senator ERVIN. Thank you very much for a most helpful paper. We appreciate your coming very much.

Professor HAVILAND. Thank you, Senator.

BIOGRAPHICAL INFORMATION—H. FIELD HAVILAND, JR.

Education.—1937-41—Harvard College, A.B., major in government, 1946-49—Harvard University, M.A. and Ph.D., Department of Government (International Relations).

Positions.—1942-43—Board of Economic Warfare, Washington, D.C., Colombia and Venezuela, administrative officer. 1943-46—United States Navy, lieutenant. 1948-49—Hoover Commission Task Force on Foreign Policy, consultant on, executive-legislative relations. 1949-56—Haverford College, Professor of International Relations. 1956-69—Brookings Institution, senior staff member, 1956-60; Director of Foreign Policy Studies, 1960-69. 1969—Fletcher School of Law and Diplomacy, Tufts University, Professor of International Politics.

PUBLICATIONS

The Political Role of the General Assembly (New York: Carnegie Endowment for International Peace, 1951).

American Foreign Policy and the Separation of Powers (Cambridge: Harvard University Press, 1952), co-author.

Organizing for Peace (Boston: Houghton Mifflin Co., 1954), co-author.

The U.S. and the Western Community (Haverford: Haverford College Press, 1957), editor.

Administrative Aspects of U.S. Foreign Assistance Programs (Washington: Government Printing Office, 1957), co-author.

The Formulation and Administration of U.S. Foreign Policy (Washington: Government Printing Office, 1960), co-author.

The United States and the United Nations (Baltimore: The Johns Hopkins University Press, 1961), co-editor.

The Atlantic Community: Progress and Prospects (New York: Frederick A. Praeger, 1963), co-editor.

Vietnam After the War: Peacekeeping and Rehabilitation (Washington: Brookings Institution, 1968), co-author.

Professional Activities

Member, Board of Editors, *International Organization* (1947—present).

Member, Social Science Research Council Board of Directors (1959-63) and Committee on International Organization Studies (1964-1970).

Vice-Chairman, American Council of Learned Societies (1966—present).

Member, Advisory Committee on International Exchange of Persons (Post-doctoral Fulbright Program), Conference Board of Associated Research Councils (1957-68).

Member, National Commission for UNESCO (1971—present).

Member, Commission to Study the Organization of Peace (1960—present).

Member, Board of Trustees, Hazen Foundation (1966—present).

Member, American Political Science Association. Member, Executive Committee (1963-65). Program Chairman (1965).

Member, International Studies Association, President (1967-68).

Member, American Society of International Law (1972—present).

Member, Council on Foreign Relations, New York City.

Senator ERVIN. Mr. Stevenson, you may come back to the stand, please, sir.

STATEMENT OF HON. JOHN R. STEVENSON, LEGAL ADVISER DEPARTMENT OF STATE; ACCOMPANIED BY CHARLES BEVANS, ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS—Resumed

Mr. STEVENSON. Mr. Chairman, I appreciate your permitting me to be a little late as I had another commitment.

Senator ERVIN. It worked out very well because Professor Haviland, I think, has to catch an early plane, and so it freed him.

Mr. STEVENSON. Fine.

Professor KURLAND. Mr. Stevenson, preliminarily, may we have a copy of circular 175 procedure?

Mr. STEVENSON. Oh, you certainly may. [Circular 175 is inserted following this testimony.]

Professor KURLAND. The real problem it seems with which we are concerned here is the category of so-called independent constitutional

powers of the President and his capacity to effectuate executive agreements under that authority.

I think nobody questions that agreements which involve a basic political commitment, such as an undertaking to come to the defense of another country if it is attacked, should be cast in the form of a treaty in the constitutional sense.

Can we be assured we have no commitments to a foreign country to come to its defense in case it is attacked that has taken or takes the form of an executive agreement?

Mr. STEVENSON. I think that that is the case. We have reviewed this pretty carefully and the only ones that I can think of that could be stated to not be in the form of a treaty were three agreements in the Middle East, but those were not the usual form which simply states that an attack on the country in question could be viewed as an attack on the United States and that we will determine what action to take in accordance with our normal constitutional processes.

They went a step further and said that in such an event, there would be mutual discussion as to what should take place.

Really in our view they were not commitments as to what should be done. I think those are the only three.

Professor Kurland. What is the difference between a commitment and an understanding?

Mr. STEVENSON. I am sorry.

Professor KURLAND. Is there a difference between a commitment and an understanding?

Mr. STEVENSON. No. I think just by their terms those three agreements—I would like to supplement this for the record to give you the exact language—do in fact have language which takes away from the bindingness of any obligation. It really puts it up to you at the time what you are going to do. So I think those would be the only exceptions.

We have defense cooperation agreements in the form of executive agreements with Iran (TIAS 4189), Pakistan (TIAS 4190), and Turkey (TIAS 4191). The texts of the agreements are identical except for the names of the countries; in each case, article 1 provides as follows:

The Government of Turkey [Iran/Pakistan] is determined to resist aggression. In case of aggression against Turkey [Iran/Pakistan], the Government of the United States of America, in accordance with the Constitution of the United States of America, will take such appropriate action, including the use of armed forces, *as may be mutually agreed upon* and is envisaged in the Joint Resolution to Promote Peace and Stability in the Middle East, in order to assist the Government of Turkey [Iran/Pakistan] at its request.

The phrase "as may be mutually agreed upon" means in effect that the undertaking in these agreements is to consult the other government when requested to do so on appropriate action which the United States might be prepared to agree to take in accordance with the Constitution.

Professor KURLAND. All three of those are public, aren't they?

Mr. STEVENSON. Yes. Yes.

Professor KURLAND. Do we know that in the nonpublished executive agreements there is no such commitment.

Mr. STEVENSON. Political commitment to come to their defense? No sir.

Professor KURLAND. To any foreign country?

Mr. STEVENSON. No sir.

Professor KURLAND. Is there something more sensitive in such commitments that precludes the publication of all executive agreements?

Mr. STEVENSON. Well, obviously there are a number of executive agreements that deal with matters which from a national security standpoint or other standpoint are classified.

Now, in some cases the reason that they are classified isn't because of the nature of the obligation. It is because there may be military information as annexes, for example, to the agreement, and so there are, of course, a number of agreements that do relate to subject matters which are classified whether or not there is agreement involved. It is just that sort of area.

Professor KURLAND. Well, I assume that some of those might be published without revealing what their secrets are if you did not publish the annexes. My problem obviously is that there are a number of executive agreements by which the Congress is forbidden to know.

Mr. STEVENSON. I think the other point that I might want to make about this is that some of those agreements are basically arrangements for carrying out the basic commitment that is public and is known. I mean, such as the NATO commitment or these other basic ones. These are merely in a way implementations of that and I do not think that they change the nature of our commitment. They simply indicate how it would be discharged and I think without—

Professor KURLAND. I want to come back to the main proposition. I do not think we are concerned here with the executive agreement which is in effectuation of the treaty, effectuation of legislation, or which has some congressional sanction. We are concerned I think—the real problem here, one that falls outside of the 97 percent, is the area in which the executive agreement purports to be vested in the independent constitutional powers.

The problem I put is these agreements, not those to effectuate NATO or SEATO or similar treaty arrangements but these kinds of agreements which are not brought before Congress, the representatives of the American people. So that we do have as a nation presumably a series of commitments in which Congress has not only not participated but about which it is kept in ignorance.

Mr. STEVENSON. Well, I am not sure we have broken down the figures as to what percentage of so-called classified agreements are agreements under the President's independent powers. My offhand feeling is that most of the classified agreements are of the type you mentioned earlier, implementing the basic political commitment which is in a published treaty. But I just do not feel that there would be very many in that area that are exclusively executive in nature.

What about that, Charley?

Mr. BEVANS. There are not, no.

Professor KURLAND. But I think it would be quite reassuring to know that these nonpublished agreements are pursuant to authoriza-

tion either by way of treaty or statute or some other form of legislative action because so long as there is this group of agreements which are not revealable, then anybody must use his imagination as to what the contents of those agreements might be.

I have only one other question, if I may. As I understand it, your statement on page 27, the executive branch has no opposition to S. 596, which has passed the Senate and is in the House of Representatives.

Mr. STEVENSON. Right.

Professor KURLAND. Have you communicated that position to the appropriate authorities in the House of Representatives?

Mr. STEVENSON. I think it has been conveyed to the chairman of the Subcommittee of the Foreign Affairs Committee who is charged with this matter.

Professor KURLAND. Thank you, Mr. Stevenson.

Mr. EDMISTEN. Mr. Stevenson, in retrospect, don't you believe that it would have been the wiser course of action to have submitted the Spanish bases agreement and a source agreement to the Congress? It would have saved a lot of trouble, wouldn't it?

Mr. STEVENSON. You mean I might not be here now?

I think that the Spanish bases agreement, as we pointed out here, from a legal standpoint is basically no different than the other agreements in terms of it's not involving a political commitment. I do not want to go over the whole ground as to why it was not submitted as a treaty. I think Secretary Johnson went through that very fully and the reasons why that was not done.

Now, as we have pointed out, clearly the—we intend to consult in these matters in the future and there was a good deal of consultation in that case. We did not—the executive branch did not come to the decision that would have been most generally agreeable to the Senate.

On the other hand, I think the other point about that particular agreement was that we were very anxious to avoid any inference that this was a political type of commitment to defend Spain, and if it had been in the form of a treaty, I think that inference might well have been reached.

In point of fact, as you probably know, there were some declarations in the prior executive agreements relating to Spanish bases which were taken out simply because some members of the Foreign Relations Committee thought that they implied a commitment. So it was less of a commitment in this sensitive defense area than what we had before.

Mr. EDMISTEN. Apparently the Senate, though, feels that there is much more in that agreement than does the executive branch of Government revealed? It passed Senate Resolution 214 by 50 to 6, so there does appear to be a misunderstanding or something of a moot affair.

Mr. STEVENSON. I know Secretary Johnson made this statement several times, but just to make it clear in the record, there are no secret protocols or annexes to that Spanish agreement. There is nothing there but what has been made public.

Mr. EDMISTEN. Do you believe that Senator Ervin's bill would unduly hamper your operations? How many agreements would you

be sending up here? I know that some people have alleged that there would be truckloads coming up to the Congress. Now, that is not really so, is it?

MR. STEVENSON. Well, I think, as I indicated earlier, our problem is basically with the question of having delay in effectiveness of some agreements that could affect our negotiating position in some circumstances.

Now, the question of how many agreements would come up would, of course, depend on how broadly you defined what you wanted. As we have indicated, the sort of agreements that the State Department has been primarily concerned with are what we call international type agreements. We are not concerned and we do not publish, for example, the more than—I think I have seen the figure—3,000 military sales contracts because we regard those as contract under municipal law and not international agreements. So obviously, from the standpoint of volume, it would depend pretty much on the definition how many agreements you would get.

MR. EDMISTEN. Well, under the present system of operation, the Congress depends upon the good faith of the executive branch of the Government on many occasions in the executive agreement field, does it not? Now, would it not be the same if the Ervin bill were to become law that the executive branch would have to depend upon the good faith of the Congress to not object to every minute thing that was sent up here?

I think the executive branch is asking the Congress to accept many of its actions in good faith. I do not understand why the executive branch could not have that same faith in Congress under the procedures of the Ervin bill.

MR. STEVENSON. Well, I think basically it is not just a question of having faith in the Congress. Under the bill we would have no possibility of having an effective agreement in those situations where, because of the negotiating situation or the urgency of the matter, it was important to have an agreement effective at the time it was negotiated.

We have had a number of situations where we have had to enter into agreements relating to emergency relief such as the relief for the Peruvian earthquake situation, and you just wouldn't have time to have that be before Congress for 60 days or even more in some cases.

You have obviously some military situations such as the settlement of the Berlin blockade in which it was urgent that that agreement be made right away and not wait 60 days or more.

You have armistice situations which involve also agreements that have to take effect right away. So it is not a question of good faith. We could both be acting in the best faith in the world but simply because of the procedural requirements of this legislation, we couldn't operate in those situations.

I also think on the good faith point that with the Case bill—the Congress would have a check on whether the executive branch has been acting in good faith or not. I think this is largely the case today because we have had this very extensive publication program and copies of those publications are automatically sent to the appropriate committees.

Mr. EDMISTEN. You are talking about this?

Mr. STEVENSON. That is one of the publications. There are many others.

Charley, you might indicate what your practice is on that.

Mr. BEVANS. Well, it is our practice in connection with executive agreements entered into, as well as treaties, to publish them in your "Treaties and other International Acts," ordinarily within a few weeks. Sometimes we have delays because of errors in timing but we regularly publish them, and it is our policy to publish everything that can be considered as constituting international agreement.

These may be some instances, as has been pointed out, where there may be something that is classified, and we do not publish that.

Mr. EDMISTEN. You do not really publish the text, though, do you?

Mr. BEVANS. Yes sir, we publish the text.

Mr. STEVENSON. The publication you have is the "Treaties in Force". That just lists all the treaties and international agreements that are in force at a particular time but in addition to that we have other publications containing the texts of the agreements.

Mr. BEVANS. This is the "Treaty of Friendship and Cooperation with Spain," the one we published promptly.

Mr. EDMISTEN. That is the treaty?

Mr. BEVANS. No. This is an executive agreement.

Mr. EDMISTEN. It is?

Mr. BEVANS. Did I say treaty? I meant to say executive agreement.

Professor KURLAND. It is hard to tell the difference.

Mr. EDMISTEN. I know the publication is "Treaties in Force". The overwhelming majority of these, though, are executive agreements.

Mr. BEVANS. They are and we try to make that clear.

Mr. EDMISTEN. Now, you do have some executive agreements in force that are not listed in this publication, do you not?

Mr. BEVANS. A very small percentage, classified.

Mr. EDMISTEN. Now, I want to ask one more question. Several witnesses have appeared before the subcommittee and stated that the executive branch of the government should welcome a bill of this nature as an indication that the Congress wants to share some of this awesome responsibility. Don't you believe that would be helpful?

Mr. STEVENSON. Well, as I tried to indicate at the end of my statement, the administration—Secretary Rogers in particular—is very concerned with the problem of effective relations between the two branches. In many of these areas it is a question of shared powers, particularly in the defense area, and we certainly agree with the general philosophy of those statements, that this is something where the country is served best if we have a shared responsibility.

On the other hand, for the reasons I gave in my statement, we do not feel that this legislation would in fact in many areas lead to the best sort of shared responsibility, and in fact, we think it could create some unnecessary conflicts between the two branches.

On the other hand, as I indicated, we would not oppose the proposal in the Case bill for transmittal of executive agreements.

Senator ERVIN. Now, as I construe your testimony, you use the word "commitment" in a much more restricted sense than I have

heard it used by other members of the executive branch of the government and other members of the State Department, for example. I remember sitting up with the Armed Services Committee and Foreign Relations Committee at the time we were considering the Gulf of Tonkin resolution and if I recall, both the Secretary of State and Secretary McNamara came down and said we had made commitments to South Vietnam and when I asked them about what the commitments were, it turned out there were some letters that President Kennedy had written to the President of South Vietnam and some public statements which other Presidents had made.

Now, you do not take statements of that kind to be commitments, as I construe your statement.

MR. STEVENSON. Well, I think you have to always examine what the particular documents in question are. Now, obviously as a legal matter, you could have a commitment that isn't necessarily in the form of a formal treaty or formal type agreement. You could have an exchange of notes or an exchange of letters. On the other hand, I think the confusion comes not from the fact that different types of writings could contain a legal obligation but from the fact that some people loosely use the term "commitment" to refer to something that is just a policy statement. There is no obligation whatsoever there. And I agree with you that this in some cases has led to misunderstandings because they are talking about creating expectations but there has been no obligation as we lawyers would understand it.

SENATOR ERVIN. Yes; now, I think you very well place executive agreements in three categories. The first category includes agreements which the President has the exclusive power under the Constitution to make. The second one is the category in which the executive agreement is made pursuant to prior authorization of a treaty or an act of Congress. And the third is an executive agreement which necessarily either expressed or impliedly requires subsequent legislation from Congress to implement it.

Now, I can see some pretty plausible case made for the proposition that Congress cannot regulate the first type despite the fact that I believe they could establish some procedure that did not deny the President the right to make it. And I can also see some constitutional objections raised to the second one, that is, where it has been authorized by prior act of Congress or prior treaties, because it would take a subsequent act of Congress to either annul the treaties or to repeal the act of Congress. Of course, I do not know what the situation would be on the treaty, but in the case of the act of Congress, the President would have veto power.

But I cannot see any constitutional impediment at all to Congress passing a general law saying that any executive agreement made by the President which requires implementation by subsequent act of Congress is void in certain fields if Congress deems it necessary to make some specific requirement, or is void unless subsequently ratified by Congress.

I see no great difference between Congress saying we approve or disapprove of this and Congress passing affirmative, legislation to implement it. I am speaking of this from a constitutional standpoint.

Mr. STEVENSON. Well, I think I basically agree with you from a constitutional standpoint. I think the point is, though, that since subsequent legislation is required in any event, it would seem unnecessary to have this other step because in that type situation, we in the executive branch should make it clear to the other party that the commitment is subject to appropriate congressional action, and that in fact is what is invariably done. And if it isn't done, the lawyers have made a mistake because, if it requires such action, we should not be obligated in such a way that there would be a breach if the legislation wasn't adopted.

Senator ERVIN. Now, as we agreed this morning, there is nothing in the Constitution to define exactly what the scope of a treaty is but it would seem to me that it is implied in the words treaties and agreements, the nature of contracts between two or more countries.

Mr. STEVENSON. I think that is surely correct. On the other hand, you do have other language in the Constitution which indicates that the Founders were not identifying the treaty as being the only sort of international agreement because, I think it is in the restriction on the powers of the State that they indicate that there are several different types of agreements that they couldn't enter into.

Senator ERVIN. Yes, but the question I would like to have your legal opinion on is this. Section 2 of article 1, of course, referring to treaties, says he—that is, the President—shall have power by and with voice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur.

Then you have the necessary and proper clause to the Constitution. Why would Congress not have the power under the necessary and proper clause of the Constitution in carrying out the provision about treaties, why should Congress not have the power to define exactly what kind of agreements have to be placed in the form of treaties?

Mr. STEVENSON. Well, I think my answer to that would be that the necessary and proper clause, at least as I view it, is fundamentally to carry out, to execute the other powers, not to define what those powers are. It seems to me if Congress had the power under the necessary and proper clause to define the powers that it was charged with executing, that it in effect would have the basis for infringing the powers of the other branches of the government.

Senator ERVIN. Well, why wouldn't Congress have the power under the necessary and proper clause to say no agreement involving—say something in the nature of the national commitment resolution, that no agreement made by the President pledging the use of American forces to the defense of another country or pledging the expenditure of funds shall be valid unless it is reduced to the form of a treaty and ratified by the Senate?

Mr. STEVENSON. Mr. Bevans has a comment he wants to make on this. Then I will come back.

Mr. BEVANS. Excuse me, sir. In connection with the pledging of funds, we are very careful never to make any agreement pledging funds unless we already have them appropriated or unless we make the agreement subject to the appropriation of funds. We are most careful about that.

As a matter of fact, this is a provision in the United States Code that no officer of the government shall make any commitment for the expenditure of funds that have not been appropriated for a particular purpose.

Senator ERVIN. I do not believe the President and Secretary of State are very careful in some of the language. As I recall a few years ago, one or the other went down to South America and made a speech in which he promised Congress was going to appropriate a whole lot of money for the Alliance for Progress.

Mr. BEVANS. I am speaking of the agreements we work with daily. Now, I regard that as a political statement rather than a legal commitment.

Senator ERVIN. Well, then he comes back to us and says, well, now, we have promised it and you have to conform; otherwise you leave us in a fix that makes us guilty of breach of faith. But, seriously, I cannot see why there would be any constitutional impediment to Congress passing a law saying no agreement made with any foreign nation which involves the use of American Armed Forces in the defense of that nation or involving the expenditure of public funds shall be valid unless it is reduced to the form of a treaty and ratified by the Senate.

Mr. STEVENSON. I think my basic problem with that, Senator, is it does seem to me that the Congress is then interpreting what the Constitution means by the treatymaking power. Perhaps more than that, it is also interpreting what the powers of the President may be under the commander-in-chief power and the power to receive Ministers and the Executive power. And it just doesn't seem to me that that is the proper application of the necessary and proper clause.

Senator ERVIN. Well, I submit that the one power is rather specific and the other is general and indefinite. In other words, the power to receive Ministers is rather specific and I have no trouble with saying that gives the President the right to recognize what is the valid government of another country, but here is a word treaty. If Congress can pass no law about treaties or what the nature of treaties would be, you have got a provision in the Constitution which is so vague and indefinite it cannot be enforced and therefore it is worthless and beyond the legislative power of Congress under section 1 of article 1 under the necessary and proper clause.

Mr. STEVENSON. In support of my view of this, I wish there were more judicial precedents, but I think the one precedent we do have, the *Myers* case, did also involve an implied presidential power because the removal power there was an implied power. Yet it was held that the Congress couldn't take away that presidential power.

Senator ERVIN. Well, all Congress had to do with the appointive power was to approve it in the first place.

Mr. STEVENSON. Well, that is right.

Senator ERVIN. It couldn't do anything about it after that. But it would seem to me that Congress could reasonably pass a law and say what is going to be embodied, what kind of agreements have to be embodied in the treaty and what can be embodied in an executive agreement. Otherwise the legislative power of Congress is rather nonexistent in those areas, because, since the Constitution doesn't

define the treaty in express words, it doesn't mean anything really except that the President has the option of considering an agreement to be a treaty or executive agreement at his discretion.

Mr. STEVENSON. Well, Senator, wouldn't it be so, though, if that were the case, that Congress would have the legal possibility of completely taking away any independent agreement making power of the President. It would seem so to me.

Senator ERVIN. Well, there would be no problem if you were to pass a law like that and said:

Provided, however, this shall not apply in the instances where the Constitution itself gives the President the power to make an agreement without the consent of Congress.

Mr. STEVENSON. But it does seem to me that the matter you are concerned with, and very properly concerned with, is adequately dealt with in other ways.

For example, certainly there are some sorts of agreements that must be in the form of a treaty. I do not agree with those who say you can do everything by a legislative-executive agreement that you could do by a treaty. For example, one of our most long standing types of treaties has been a treaty dealing with alien property in a particular State. Well, unless this were in the form of a treaty, it couldn't have effect with respect to State law. So it has to be in the form of a treaty. And, of course—

Senator ERVIN. Well, wasn't that what the *Pink* case and *Belmont* case held? Didn't that agreement supersede the claims of creditors under New York law?

Mr. STEVENSON. I think that the situation is that the State alien descent laws can only be affected by the treaty power. There was no Federal power to affect them otherwise. Certainly an executive agreement can have some status as State law, but there are certain types of matters which are State matters that it couldn't override the way a treaty could override something that is properly a state matter.

Now, if it is a matter of Federal concern, that is something else.

Senator ERVIN. We have plenty of cases that hold that by treaty you can supersede State law in reference to matters of property, but I think that what caused Senator Bricker and many other people consternation over the *Pink* and *Belmont* cases was that they held in substance, as I understand the opinions, that the right of the President to recognize foreign countries gave the power to the President to make conditions precedent to recognition and those conditions took precedence over the law of the State of New York governing the claims of creditors of these former Russian corporations which had been in effect confiscated by the Soviet Government.

Mr. STEVENSON. But I believe that the only creditors involved in that case were foreign creditors. The U.S. creditors had been paid off.

Senator ERVIN. Had been satisfied, yes.

Mr. STEVENSON. So there was no constitutional question. Now, I think those lawyers who had the same concern you have, I think they have been to a certain extent reassured by the *Capps* case which made it perfectly clear that, in an area of shared Presidential

and congressional powers, subsequent legislation would override an executive agreement, so that there is no doubt if Congress wants to act to override executive agreements in such an area it can do so.

Senator ERVIN. I want to thank you for a most interesting paper and you have given some pertinent historical examples here and have given practical interpretations on many things. It has been very helpful to the subcommittee. I still reserve the right to disagree with other lawyers about the law because one of these days my constituents may decide to fire me as a Senator and then I have to go back to practicing law.

Mr. STEVENSON. It has been a pleasure to be with you, Senator, and I appreciate it.

Senator ERVIN. Thank you very much.

The committee will stand in recess until 10 o'clock tomorrow morning and will meet in room 2228 at that time.

(Whereupon at 3:55 p.m., the subcommittee recessed to reconvene at 10 a.m., Friday, May 19, 1972.)

BIOGRAPHICAL INFORMATION—JOHN R. STEVENSON

John R. Stevenson is the Legal Adviser of the Department of State and head of the Inter-Agency Law of the Sea Task Force. Mr. Stevenson graduated from Princeton University in 1942 summa cum laude. He received his LL.B. in 1949 and D. Jur Sc. in 1952 from Columbia Law School where he was Editor-in-Chief of the Columbia Law Review. Mr. Stevenson practiced international law with the New York firm of Sullivan & Cromwell from 1950 to 1969. He was President of the American Society of International Law from 1966 to 1968, Chairman of the Committee on International Law, New York State Bar from 1963 to 1965, and Chairman of the Association of the Bar of the City of New York Committee on International Law from 1958 to 1961.

DEPARTMENT OF STATE, 11 FOREIGN AFFAIRS MANUAL, June 6, 1969— CIRCULAR 175 PROCEDURE

CHAPTER 700. TREATIES AND OTHER INTERNATIONAL AGREEMENTS--

710 *Purpose*

a. The purpose of this chapter is to ensure that orderly and uniform procedures are followed in the negotiation and signature of treaties and other international agreements on behalf of the United States. It is also designed to ensure the maintenance of complete and accurate records on treaties and agreements and the publication of authoritative information concerning them.

b. The chapter is not a catalog of all the essential rules or information pertaining to the making and application of international commitments. It is limited to regulations necessary for general guidance.

720 *Negotiation and signature*

720.1 *Circular 175 procedure.*

This subchapter is a codification of the substance of Department Circular No. 175, December 13, 1955, on the negotiation and signature of treaties and executive agreements. It may be referred to for convenience and continuity as the "Circular 175 Procedure."

720.2 *General Objectives*

The objectives are to ensure:

a. That the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits;

b. That the objectives to be sought in the negotiation of particular treaties and other international agreements are approved by the Secretary or an officer specifically authorized by him for that purpose;

c. That firm positions resulting from negotiations are not to be undertaken without the approval of the interested assistant secretaries or their deputies;

d. That the final text developed are approved by the interested assistant secretaries or their deputies and, when required brought to the attention of the Secretary or Under Secretary a reasonable time before signature;

e. That authorization to sign the final text is obtained and appropriate arrangements for signature are made;

f. That when there is any serious question of the form an international agreement should take consultations are held with appropriate congressional leaders and committees.

721 *Exercise of the treaty-making power*

Treaties are designed to promote United States interests by securing action by foreign governments advantageous to the United States.

722 *Exercise of the executive agreement making power*

Executive agreements are not used when the subject matter is of such a nature that it should be covered by a treaty. The executive agreement form is used only for agreements which fall into one or more of the following categories:

a. Agreements which are made pursuant to or in accordance with existing legislation or a treaty;

b. Agreements which are made subject to congressional approval or implementation; or

c. Agreements which are made under and in accordance with the President's constitutional power.

723 *Action required in negotiation of treaties and agreements*

723.1 *Questions as to treaty or executive agreement form*

Where there is any serious question whether an international agreement is to be made in the form of a treaty with the advice and consent of the Senate or in the form of an executive agreement made solely under the President's constitutional authority under the authority of existing legislation or a treaty or subject to the enactment of legislation by the Congress, the matter is brought to the attention of the Legal Adviser by a memorandum prepared by the officer responsible for the contemplated negotiations. This memorandum is routed to the Assistant Secretary for Congressional Relations and other officers concerned for their clearance and comment. Thereafter, whenever circumstances permit, consultations are held with appropriate congressional leaders and committees by the office responsible for the negotiations with the assistance of the Assistant Secretary for Congressional Relations to determine the most suitable way of handling such international agreements.

723.2 *Authorization required to undertake negotiations*

Negotiations of new treaties, or new executive agreements on matters of substance, or for the extension or revision of existing ones, are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government, until authorized in writing by the Secretary or an officer specifically authorized by him for that purpose. This situation is to be distinguished from the case where a draft of an international convention may be formulated or considered in meetings of an international organization of which the United States is a member. In that event, the appropriate procedure is a staff study accompanied by the position paper for the U.S. delegation and cleared with the Secretary or an officer specifically authorized by him for that purpose. Any such conventions formulated are subject to the provisions of sections 724 and 724.3 before they are signed for the United States.

723.3 *Scope of authorization*

Approval of a request for authorization to negotiate a treaty or other international agreement does not constitute advance approval of the text nor authorization to agree upon a date for signature or to sign the treaty or agreement. Authorization to agree upon a given date for, and to proceed with, signature must be specifically requested in writing, as provided in section 724. This applies to treaties and other agreements to be signed abroad as well as those to be signed at Washington. Special instructions may be required, because of the special circumstances involved, with respect to multilateral conventions or agreements to be signed at international conferences.

723.4 *Notification to department*

a. Where authorization is given for the negotiation of a treaty or other agreement, or a series of treaties or agreements by blanket authorization, the office responsible for the negotiations informs the Assistant Legal Adviser for Treaty Affairs in each instance as soon as negotiations are undertaken with a particular country.

b. Purely operational arrangements, such as project agreements, procurement authorizations, and cash contribution agreements, need not be reported where they are in implementation of an existing international agreement.

723.5 *Conduct of negotiations*

The office responsible for any negotiations must ensure:

a. That during the negotiations no position is communicated to a foreign government as a United States position that goes beyond any existing authorization or instructions;

b. That no proposal be made or position be agreed to beyond the original authorization without approval by the appropriate assistant secretaries or their deputies, the Legal Adviser's Office, and also, in the case of the treaties or other international agreements which concern responsibilities of A.I.D., the Director of A.I.D., or his Deputy;

c. That all significant policy-determining memorandums and instructions to the field on the subject of the negotiations are submitted to and cleared by all assistant secretaries concerned or their deputies, and also, in the case of treaties or other international agreements which concern responsibilities of A.I.D., the Director of A.I.D., or his Deputy;

d. That the Secretary or Under Secretary is kept informed in writing of important policy decisions and developments, including any particularly significant departures from substantially standard drafts that have been evolved;

e. That with the advice and assistance of the Assistant Secretary for Congressional Relations, the appropriate congressional bodies are kept advised of the intention to negotiate any especially significant treaties or executive agreements and of important developments concerning them; and

f. That, in any case where any other department or agency is to play a primary or significant role or has a major interest in negotiation of an international agreement, the appropriate official or officials in such department or agency are informed of the necessity of complying with the requirements of this subchapter.

723.6 *English-language text*

Negotiators will assure that every bilateral treaty or other international agreement to be signed for the United States contains an English-language text. If the language of the other country concerned is one other than English the text shall be done in English and, if desired by the other country, in the language of that country. A United States note that constitutes part of an international agreement effected by exchange of notes shall always be in the English-language. Such note shall not be in any other language unless specifically authorized. The note of the other government concerned may be in whatever language that government desires.

724 *Transmission of texts to Secretary*

The texts of treaties and other international agreements must be completed and approved in writing by all responsible officers concerned sufficiently in advance to give the Secretary or Acting Secretary, or the person to whom authority to approve the text has been delegated adequate time before the date of signing to examine the text and dispose of any questions that arise. Posts must transmit the texts to the Department as expeditiously as feasible to assure adequate time for such consideration. Except as otherwise specifically authorized by the Secretary or the Acting Secretary, a complete text of a treaty or other international agreement must be delivered to the Secretary or the Acting Secretary, or other person authorized to approve the text, before any such text is agreed upon as final or any date is agreed upon for its signature.

724.1 *Approval and authorization to sign*

The text (including the complete text of any annex, schedule, exchange of notes, or other related document) is accompanied by a memorandum requesting

authorization to make arrangements for signature of that text. The memorandum indicates the approval in writing of:

- a. The assistant secretary or other equivalent officer (or his authorized representative) primarily responsible for the subject involved;
- b. The Director of A.I.D. or his Deputy, for a treaty or other international agreement which concerns responsibilities of A.I.D.;
- c. The Office of the Legal Adviser, for legality and form of the text;
- d. The Office of the Assistant Secretary for Congressional Relations;
- e. Other Department clearances as required; and
- f. A high-ranking officer of any other agency which has primary responsibility for or substantial interest in the subject (for example, aviation, copyrights, patents, taxation, or military base rights).

724.2 *Engrossing documents for signature*

After the text of a treaty or other agreement is approved in writing in accordance with section 724.1, the document is engrossed for signature in the Department.

Adequate time (normally 7 business days) is allowed for the engrossing (typing on treaty paper), comparing, etc., of the treaty or other agreement to be signed, in order to assure sufficient time for the preparation of accurate texts in duplicate for signature, including, in the case of documents to be signed in a foreign language, sufficient time for the Language Services Division to prepare any translations required, check any existing foreign-language draft, and check the engrossed foreign-language text. The determination of the amount of time required in each instance to complete the engrossing is the responsibility of the Assistant Legal Adviser for Treaty Affairs.

724.3 *Certificate on foreign-language text*

Before any treaty or other agreement containing a foreign-language text is laid before the Secretary or the Acting Secretary (or any person authorized by either of them) for signature, a signed memorandum must be obtained from a responsible language officer of the Department certifying that the foreign-language text and the English-language text are in conformity with each other and that both texts have the same meaning in all substantive respects. A similar certification must be obtained for exchange of notes that set forth the terms of an agreement in two languages.

725 *Transmission of texts to assistant legal adviser for treaty affairs*

The officer responsible for the negotiation of a treaty or other agreement at any post is responsible for ensuring the most expeditious transmission of the signed original text, together with all accompanying papers such as agreed minutes, exchanges of notes, plans, etc., to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs; *provided* that where originals are not available accurate certified copies are obtained and transmitted as in the case of the original. (See section 735.2.) Any officer in the Department having in his possession or receiving from any source a signed original or certified copy of a treaty or agreement or of a note or other document constituting a part of a treaty or agreement forwards such documents immediately to the Assistant Legal Adviser for Treaty Affairs.

726 *Authorization to negotiate and/or sign*

726.1 *Action memorandum*

A request for authorization to negotiate and/or sign a treaty or other international agreement takes the form of an Action Memorandum addressed to the Secretary or Acting Secretary, cleared with the Office of the Legal Adviser, the Office of the Assistant Secretary for Congressional Relations, and other appropriate bureaus, and submitted through the Executive Secretariat. The Action Memorandum may request one of the following: (a) authority to negotiate, (b) authority to sign, or (c) authority to negotiate and sign. The request in each instance states that any substantive changes in the draft text will be cleared with the Office of the Legal Adviser and other specified regional and/or functional bureaus before definitive agreement is reached. Drafting offices consult closely with the Office of the Legal Adviser to ensure that all legal requirements are met. The Action Memorandum is accompanied by a memorandum of law prepared in the Office of the Legal Adviser.

726.2 *Separate authorizations*

When authorization is sought with respect to a particular treaty or other agreement, either multilateral or bilateral, the action memorandum for this purpose outlines briefly and clearly the principal features of the proposed treaty or other agreement, indicates any special problems which may be encountered, and, if possible, the contemplated solutions of those problems. The concurrences of the Office of the Legal Adviser and of the geographic and functional bureaus concerned are obtained with respect to such changes as may be made in texts in the course of negotiations and to agreement on definitive texts.

726.3 *Blanket authorizations*

In general, blanket authorizations are appropriate *only* in those instances where, in carrying out or giving effect to provisions of law or policy decisions, a series of agreements of the same general type is contemplated; that is, a number of agreements to be negotiated according to a more or less standard formula (e.g., P.L. 480 Agricultural Commodities Agreements; Educational Exchange Agreements; Investment Guaranty Agreements; Weather Station Agreements, etc.) or a number of treaties to be negotiated according to a more or less standard formula (e.g., consular conventions; extradition treaties, etc.). The basic precepts under section 726.2 apply equally to requests for blanket authorizations. In such cases, authorization is conditioned upon the concurrence of the Office of the Legal Adviser and the regional and functional bureaus as well as other agencies concerned in regard to the proposed texts, changes in such texts in the course of negotiations, and agreement on definitive texts.

726.4 *Public statements*

No public statement is to be made indicating that agreement on a text has been reached, or that negotiations have been successfully completed, before authorization is granted to sign the treaty or other agreement. If such authorization has been granted subject to a condition that no substantive change in the proposed text is made without concurrence of the Office of the Legal Adviser and other specified offices, no such public statement is to be made until definitive agreement on text has been reached with the concurrence of the Office of the Legal Adviser and the other specified offices. Normally, such a public statement is made only at the time a treaty or other agreement is actually signed, inasmuch as it remains possible that last-minute changes will be made in the text. Any such statement prior to that time must have the concurrence of the Office of the Legal Adviser, the Office of the Assistant Secretary for Congressional Relations, and the other specified offices, and the approval of the Secretary or the Department principal who originally approved the Action Memorandum request under "Circular 175 Procedure."

726.5 *Method of concluding agreements*

An agreement may be concluded (entered into) by the process of bilateral negotiations which result either in the signing of a single instrument in duplicate or in exchange of diplomatic notes, or by the process of multilateral negotiations, usually at an international conference to which the governments concerned send official delegations for the purpose of formulating and signing an instrument of agreement.

730 *Bilateral treaties and agreements*

730.1 *Negotiation and background assistance*

Whenever the negotiation of a new international agreement is under consideration, the post or the Department office having primary responsibility informs the Legal Adviser and requests background material and advice regarding relevant provisions in existing treaties and agreements, the general treaty relations of this Government with the government or governments concerned, and other pertinent information.

730.2 *Role of office of the legal adviser*

a. *Legal review of draft agreements.*

As soon as tentative provisions for an agreement are considered or drafted, the Office of the Legal Adviser is requested to make available the services of an attorney-adviser to ensure that the agreement is properly drafted and

agreed policy is expressed clearly and fully. The Office of the Legal Adviser prepares a draft in the first instance upon the request of another office.

b. Legal Clearance Required.

Any draft of a proposed treaty or agreement and outgoing correspondence regarding the negotiation, signature, and ratification or approval, as well as the existence, status, and application, of any international agreement to which the United States is or may become a party, is cleared with the Office of the Legal Adviser and with other appropriate bureaus or offices.

731 Negotiations

731.1 Instructions to negotiators

When an agreement is to be concluded at a foreign capital, the Department designates the American negotiator or negotiators, and he or they are given appropriate instructions. If the agreement to be negotiated is a treaty which will be referred to the Senate, the Secretary of State may at some time prior to or during the negotiations seek from the President, or in certain cases issue on his own authority, a "full power" (see section 733) constituting formal authorization for the American negotiators to sign the agreement. Such a "full power" is not customary with respect to an executive agreement. The receipt or possession of a "full power" is never to be considered as a final authorization to sign. That authorization is given by the Department by a written or telegraphic instruction, and no signature is affixed in the absence of such instruction. If the proposal for an agreement originates with the United States, the American negotiators as a rule furnish a tentative draft of the proposed agreement for submission to the other government for its consideration. The negotiators submit to the Department any modification of the draft or any counter-proposal made by the other government and await instructions from the Department. If the original proposal emanates from a foreign government, the mission forwards the proposal to the Department and awaits its instructions.

731.2 Clearance of draft agreements with the department

In no case, after accord has been reached on the substance and wording of the texts to be signed, do the negotiators sign an agreement or exchange notes constituting an agreement until finally instructed by the Department to do so as stated in section 731.1. If an agreement is to be signed in two languages, each language text must be cleared in full with the Department before signature, as required by section 724.3.

731.3 Avoiding obstacles to publication and registration

The necessity of avoiding any commitment incompatible with the law requiring publication (1 U.S.C. 112a) and with the treaty provisions requiring registration (see section 736.4) should be borne in mind by U.S. negotiators. Although negotiations may be conducted on a confidential basis, any definitive agreement or commitment entered into must be devoid of any aspect which would prevent the publication and registration of the agreement.

731.4 Questions on immediate public disclosure

In any instance where it appears to the U.S. representatives that the immediate public disclosure upon its entry into force of an agreement under negotiation would be prejudicial to the national security of the United States, the pertinent circumstances shall be reported to the Secretary of State and his decision awaited before any further action is taken. Where such circumstances are known before authorization to negotiate or to sign is requested, they shall be included in the request for authorization. All such reports and requests are to be cleared with the Office of the Legal Adviser.

732 Preparation of texts for signature

If an agreement is to be signed at a post abroad as a single instrument (in duplicate), the engrossing is customarily done in the foreign office. However, the mission may lend assistance if the foreign office so desires. There is no universal standard as to the kind or size of paper which must be used (each foreign office has its own "treaty paper"), and the texts may be engrossed either by typing or by printing. For every bilateral agreement there must be two originals, one for each government. Each original must embody the full text of the agreement in all the languages in which the agreement is to be signed, subject only to the principle of the "alternat."

732.1 *Principle of the alternat*

732.1-1 *Arrangement of texts*

When English and a language other than English are both used, the texts in the two languages are placed (a) in parallel, vertical columns on the same page, the columns being approximately of equal width, or (b) on opposite facing pages of the document the entire width of the typed or printed space on the page, or (c) in "tandem" fashion, that is, with one text following the other.

The first-mentioned style is preferred particularly for treaties and other important agreements, as it lends itself more conveniently to the binding and sealing of the agreement as a single instrument with each representative signing once in the center of the page of each of two originals. If this style is used, the English text is placed in the left column of each page in the original to be retained by the United States, and the foreign text appears in the right column. In the other original, to be retained by the foreign government, the foreign text appears in the left column, and the English text in the right column.

If the two languages are placed on opposite facing pages of the document, the English text occupies the left-hand page and the foreign text the right-hand page in the United States original, and conversely in the foreign government's original.

If the two languages are placed "tandem" fashion, the English text is placed first in the United States original, and conversely in the foreign government's original.

If either the opposite facing page or the "tandem" style is used, the concluding part (usually beginning "In Faith Whereof," "In Witness Whereof," "Done," etc.) engrossed in parallel columns appears on the page on which the signatures will appear, so that only one set of signatures is required for each separately bound document.

If parallel columns are not feasible, the concluding paragraphs can be placed "tandem" fashion on the page on which the signatures appear. If the oriental text is one which, from the occidental viewpoint, reads from back to front, it may be possible to join the two texts in a single document so that the signatures appear, roughly speaking, in the center of the document. Separate documents for the two languages are not desirable if any of the methods first mentioned is feasible, although extraordinary circumstances may justify exceptions. In the event of exceptional circumstances affecting the engrossing, it would be well for the negotiators to seek instructions from the Department.

732.1-2 *Arrangement of names and signatures*

In the original to be retained by the United States, the United States and the plenipotentiary of the United States are named first in both the English and foreign texts, wherever the names of the countries or of the plenipotentiaries occur together conjunctively or disjunctively; and the signature of the plenipotentiary of the United States appears above the signature of the foreign plenipotentiary. Conversely, throughout both texts of the original to be retained by the foreign government, that government and its plenipotentiary are named first and his signature appears above the signature of the U.S. plenipotentiary. The position of full sentences or paragraphs in the text is never transposed in the alternat procedure.

732.2 *Conformity of texts*

After the documents have been engrossed on the basis of agreed texts, and before the signing of the agreement, the negotiators or other responsible officers make sure that the texts in the two languages of both originals of the engrossed agreement are in exact conformity with the texts of the two languages in the drafts agreed to. Prior to engrossing it should have been determined that the foreign-language text is essentially (i.e., as a matter of substance) in accord with the English text, and that it has received the clearance of the Department as required in section 724.3. Nonetheless, it is well, in examining engrossed documents for conformity of texts, to bear in mind the need for substantive conformity. If any substantive divergence is discovered, the mission immediately seeks instructions from the Department. The punctuation of the two texts must conform to the extent necessary to ensure that there is no substantial divergence between them.

733 *Exchange or exhibition of full powers*

Each representative who is to sign a treaty is furnished a full power signed by the Head of State, Head of Government, or Minister for Foreign Affairs. More than one representative may be named in a single instrument of full power. Formal full powers may be (but customarily are not) issued also for the signing of certain executive agreements. When issued, the full power is formal evidence of the authority of the representative to sign on behalf of his government. It names the representative and shows his title and a clear indication of the particular instrument of agreement which he is entitled to sign. If the agreement itself requires the exchange of full powers, they are exchanged. If not, they may be either exchanged or exhibited by the representatives on the occasion of signing the agreement, as may be preferred by the foreign representative. If exchanged, the original full power of the foreign representative is forwarded to the Department with the United States original of the signed agreement. If the representatives retain the original of their respective full powers, the foreign representative is requested to furnish a photostat or certified copy of his full power.

734 *Signature and Sealing*

When the engrossing of a treaty or other international agreement which is to be signed as a single instrument has been completed, mutually convenient arrangements for its signature are made by the host government. In the case of treaties, the signatures of the representatives are often accompanied by their respective seals, ribbons being fastened in the seals and binding the document. The same procedure may be followed for other agreements signed as single instruments; it is not essential unless the agreement specifically requires seals to be affixed. The representative's personal seal, if available, is used when seals accompany the signatures.

(Note: With the exception of the Secretary of State, a representative must furnish his own seal. It may consist of a signet ring with his initial(s) or family crest, written initials, etc. A corporation seal, the seal of the Department, a foreign seal, or any other nonpersonal seal not used in lieu thereof, except that where the representative has no personal seal, the seal of the mission may be used if seals are required and the other government concerned follows a practice of using the foreign office seal.)

735 *Transmission of certified copies to the department*

When an exchange of diplomatic notes between the mission and a foreign government constitutes the agreement or has the effect of extending, modifying, or terminating an agreement to which the United States is a party, a properly certified copy of the note from the mission to the foreign government, along with the signed original of the note from the foreign government, is sent, as soon as practicable, to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs.

Likewise, if, in addition to the treaty or other agreement signed, notes related thereto are exchanged (either at the same time or thereafter), a properly certified copy (copies) of the note(s) from the mission to the foreign government are transmitted with the signed original(s) of the note(s) from the foreign government.

In each instance, the mission retains for its files certified copies of the note exchanged. The United States note is prepared in accordance with the rules prescribed in the Correspondence Handbook. The note of the foreign government is prepared in accordance with the style of the foreign office and usually in the language of that country. Whenever practicable, arrangements are made for the notes to bear the same date.

735.1 *Preparation of copies for certification*

For purposes of accuracy of the Department's records and publication and registration, a certified copy must be an exact copy of the signed original. It must be made either by typewriter (ribbon or carbon copy) or by facsimile reproduction on white durable paper (not by the duplimat method) and must be *clearly legible*. In the case of notes, the copy shows the letterhead, the date and, if signed, an indication of the signature or, if merely initialed, the initials which appear on the original. It is suggested that, in the case of a note from the mission to the foreign government, the copy for certification and transmission to the Department be made at the same time the original is pre-

pared. If the copy is made at the same time, the certificate prescribed in section 735.2 may state that the document is a true and correct copy of the signed original. If it is not possible to make a copy at the same time the original is prepared, the certificate indicates that the document is a true and correct copy of the copy on file in the mission. The word "(Copy)" is not placed on the document which is being certified; the word "(Signed)" is not placed before the indication of signatures. Moreover, a reference to the transmitting airgram, such as "Enclosure 1 to Airgram No. 18 (etc.)," is not placed on the certified document. The identification of such a document as an enclosure to an airgram may be typed on a separate slip of paper and attached to the document, but in such a manner that it may be easily removed without defacing the document.

735.2 *Certification of copies*

If, a copy of a note is part of an international agreement, such copy is certified by a duly commissioned and qualified Foreign Service officer either (a) by a certification on the document itself, or (b) by a separate certification attached to the document. A certification on the document itself is placed at the end of the document. It indicates, either typed or rubber stamped, that the document is a true copy of the original signed (or initialed) by (*insert full name of signing officer*), and it is signed by the certifying officer. If a certification is typed on a separate sheet of paper, it briefly describes the document certified and states that it is a true copy of the original signed (or initialed by) (*full name*) and it is signed by the certifying officer. The certification may be stapled to the copy of the note.

736 *Exchange of ratifications*

736.1 *Time and place for exchange*

A treaty usually contains provisions which specify where the instruments of ratification are to be exchanged. Since all treaties signed on the part of the United States are subject to ratification by and with the advice and consent of the Senate, and as the time required for action on any particular treaty cannot be foreseen, is desirable that provision is made in the treaty that the instruments of ratification are to be exchanged "as soon as possible" rather than within a specified period. It is customary for a treaty to contain a simple provision to the effect that the instruments of ratification shall be exchanged and that the treaty shall enter into force on the date of such exchange or at the expiration of a specified number of days or months following the date of exchange.

736.2 *Effecting the exchange*

In exchanging instruments of ratification the representative of the United States hands to the representative of the foreign government a duplicate original of the President's instrument of ratification, which normally embodies the full text of the treaty in all the languages in which it was signed. In return, the representative of the foreign government hands to the representative of the United States the instrument of ratification executed by the head or the chief executive of the foreign government. A protocol, sometimes called *procès-verbal*, attesting the exchange is signed by the two representatives when the exchange is made. No full power is required for this purpose. The protocol of exchange is signed in duplicate originals, one for each government, and the principle of the alternate is observed as in the treaty. Before making the exchange and signing the protocol of exchange, the diplomatic representative of the United States satisfies himself that the ratification of the foreign government is an unqualified ratification, or subject only to such reservations or understandings as have been agreed to by the two governments.

736.3 *Notification of date of exchange*

In all cases, but particularly in those in which the treaty enters into force on the day of the exchange, it is essential that the mission notify the Department by telegram when arrangements have been completed for the exchange, and also when the exchange actually takes place. The Department then will take such steps as may be necessary to have the proclamation of the treaty executed by the President. By the first pouch after the exchange takes place, if possible, the mission forwards to the Department the instrument of ratification of the foreign government and the United States Government's original of the signed protocol of exchange.

736.4 *Publication and registration*

736.4-1 *Publication*

After the necessary action has been taken to bring into force the treaty or other international agreement concluded by the United States, it is published promptly in the *Treaties and Other International Act Series* issued by the Department. After publication in that series, the text of the treaty or other agreement is printed in the annual volume (which may consist of two or more bindings) of *United States Treaties and Other International Agreements*, as required by law (1 U.S.C. 112a). Treaties and other agreements concluded prior to January 1, 1950, were published in the United States Statutes at Large.

736.4-2 *Registration*

Article 102 of the United Nations Charter requires that every treaty and every international agreement entered into by a member of the United Nations be registered, as soon as possible, with the Secretariat and published by it. Article 83 of the Chicago Aviation Convention of 1944 requires registration of aviation agreements with the Council of the International Civil Aviation Organization.

737 *Handling Procedures*

Carrying out and providing advice and assistance respecting the provisions of this chapter are the responsibility of the Assistant Legal Adviser for Treaty Affairs, who:

- a. Makes all arrangements and supervises ceremonies at Washington for the signature of treaties or other international agreements;
- b. Prepares reports by the Secretary of State to the President, and messages by the President to the Senate for transmission of treaties for advice and consent to ratification;
- c. Prepares instruments of ratification or adherence, instruments or notifications of acceptance or approval, and proclamations with respect to treaties or other international agreements;
- d. Makes arrangements for the exchange or deposit of instruments of ratification, the deposit of instruments of adherence, the receipt or deposit of instruments or notifications of acceptance or approval, and the issuance of proclamations with respect to treaties or other international agreements;
- e. Prepares instructions to foreign diplomatic missions at Washington respecting such matters;
- f. Takes all measures required for the publication and registration of treaties and other international agreements to which the United States is a party.

737.1 *Records and Correspondence Custody*

a. The Assistant Legal Adviser for Treaty Affairs compiles and maintains authoritative records regarding the negotiation, signature, transmission to the Senate, and ratification or approval, as well as the existence, status, and application, of all international agreements to which the United States is or may become a party and, so far as information is available, of agreements between other countries to which the United States is not a party. Inquiries on these subjects are addressed to, and outgoing communications cleared with, the Office of the Legal Adviser.

b. To ensure that the records regarding the matters described in this section are complete and up to date, it is important that all relevant papers be referred to the Office of the Legal Adviser.

c. The Assistant Legal Adviser for Treaty Affairs is responsible for the custody of originals of bilateral agreements and certified copies of multilateral agreements pending entry into force and completion of manuscripts for publication. Following publication, such originals and certified copies are transferred to the National Archives. The Assistant Legal Adviser for Treaty Affairs retains custody of signed originals of multilateral agreements for which the United States is depositary, together with relevant instruments of ratification, adherence, acceptance, or approval, as long as those agreements remain active.

737.2 *Responsibility for Treaty Publications*

The Office of the Legal Adviser prepares and maintains the annual publication *Treaties in Force*, an authoritative guide to the texts and status of treaties

and other international agreements currently in force for the United States. It also compiles and has published, in addition to the text referred to in section 736.4-1, other volumes containing texts of treaties and other agreements as required or authorized by law. Address inquiries in regard to such publications to the Office of the Legal Adviser.

740 *Multilateral treaties and agreements*

740.1 *General*

The procedures for the making of multilateral agreements are in many respects the same as those for the making of bilateral agreements, e.g., the general requirements in regard to full powers, ratification, proclamation and publication. This subchapter covers those procedures which are at variance with bilateral procedures.

740.2 *Negotiation*

740.2-1 *Function of international conference*

The international conference is the device usually employed for the negotiation of multilateral agreements. The greater the number of countries involved, the greater the necessity for such a conference. If only three or four countries are involved, it may be convenient to carry on the preliminary negotiations through correspondence and have a joint meeting of plenipotentiaries to complete the negotiations and to sign the document.

740.2-2 *Invitation*

Traditionally, the international conference was convened by one government extending to other interested governments an invitation (acceptance usually assured beforehand) to participate, the host government bearing most, if not all, of the expense incident to the physical aspects of the conference. This is still often the practice, but increasing numbers of conferences have been convened under the auspices, and at the call, of international organizations.

740.2-3 *Statement of purpose*

When a call is made or invitations are extended for a conference for the formulation of a multilateral agreement, it is customary for a precise statement of purpose to accompany the call or the invitations. Sometimes, the invitation is also accompanied by a draft agreement to be used as a basis for negotiations. If the conference is called under the auspices of an international organization, the precise statement of purpose or the draft agreement may be prepared in preliminary sessions of the organization or by the secretariat of the organization.

740.2-4 *Instructions to negotiators*

The U.S. delegation to a conference may be comprised of one or more representatives. As a rule, the U.S. delegation is furnished written instructions by the Department prior to the conference in the form of a position paper for the U.S. delegation cleared with the Secretary or an officer specifically authorized by him and other appropriate Department officers for that purpose, under the procedures described in section 730. The Office of the Legal Adviser in all instances reviews drafts of international conventions to be considered in meetings of an international organization of which the United States is a member; when necessary, it also provides legal assistance at international conferences and meetings.

740.2-5 *Final acts of conference*

The "Final Act" of a conference must not contain international commitments. A Final Act must be limited to such matters as a statement or summary of the proceedings of the conference, the names of the statements that participated, the organization of the conference and the committees established, resolutions adopted, the drafts of international agreements formulated for consideration by governments concerned, and the like. If an international agreement is to be opened for signature at the close of the conference, a test thereof may be annexed to the Final Act but must not be incorporated in the body thereof; the text to be signed must be prepared and bound separately for that purpose. Where a Final Act appears to embody international commitments, and the United States representative reports the same to the Department and awaits specific instructions before taking any further action.

741 *Official and working languages*

a. *General*.—The working languages of the conferences and the official languages of the conference documents are determined by the conference. A conference does not necessarily adopt all of the same languages for both purposes. It is customary and preferable for all the official languages in which the final document is prepared for signature to be designated as having equal authenticity. It is possible, however, for the conference to determine, because of specific circumstances, that in the event of dispute one of the languages is to prevail and to include in the text of the agreement a provision to that effect. Before a United States delegation concurs in any such proposal, it must request instructions from the Department.

b. *English-language text*.—Negotiators will use every practicable effect to assure that an English-language text is part of the authentic text of any multilateral treaty negotiated for the United States. Where any question exists on this subject the negotiators should seek further instructions.

742 *Engrossing*

742.1 *Language or languages used in texts*

The multilateral agreement drawn up at an international conference is engrossed for signature in the official language or languages adopted by the conference. (See section 741.) The engrossing ordinarily will be done by the conference secretariat.

742.2 *The principle of the alternat*

The principle of the alternat (see section 732.1) does not apply in the case of a multilateral agreement, except in the remote case when an agreement between three or four governments is prepared for signature in the language of all the signatories and each of those governments is to receive a signed original of the agreement. Customarily, a multilateral agreement is prepared for signature in a single original, comprising all the official languages. That original is placed in the custody of a depositary (either a government or an international organization) which furnishes certified copies to all governments concerned.

742.2-1 *Arrangement of texts*

The arrangement of multilateral agreement texts varies, depending largely on the number of languages used. As in the case of bilateral agreements, however, the basic alternatives in the case of multilateral agreements are parallel-columns, facing-pages, or "tandem," as follows:

a. *Parallel columns*.—If an agreement is to be signed in only two languages, the most common and preferred method of arrangement of the texts is in parallel, vertical columns. This method may be used also if only three languages are used, but the three columns are necessarily so narrow that the method has been rarely used in such cases. When there are four official languages, however, it is possible to use the parallel-column method by placing two of the language texts on a left-hand page and the other two language texts on the facing right-hand page; this method has been used often and to good advantage in various inter-American agreements with English, Spanish, French, and Portuguese. If any of the languages is oriental, the parallel-column method may be inexpedient and one of the other methods may be necessary.

b. *Facing pages*.—If an agreement is to be signed in only two languages, and circumstances make it necessary or desirable, the facing-page method may be used for engrossing the texts for signature, so that one of the language texts will be on a left-hand page and the other will be on the facing right-hand page. When this method is used, it is desirable that at least the concluding part (usually beginning "In Faith Whereof," "In Witness Whereof," "Done," etc.) be engrossed in parallel columns on the page on which the first of the signatures appears so that only one set of signatures is required. If parallel columns are not feasible, the concluding paragraphs can be placed tandem-fashion (one language text after another) on the page on which the first of the signatures appears.

c. *Tandem*.—If neither the parallel-column nor the facing-page arrangement is feasible for an agreement to be signed in two languages, and especially if signed in three or more languages, the texts may be arranged in tandem-style, i.e., one complete text following the other. This allows readily for any number

of official texts; the tandem-style precedent of the Charter of the United Nations is followed for the preparation of agreements formulated under the auspices of the United Nations. It is desirable, whenever practicable, that the concluding part of each text be placed with the concluding part of each of the other texts in parallel columns on the page on which the first of the signatures appears, although the tandem arrangement described at the end of section 742.2-1b can be used.

742.2-2 *Arrangement of names and signatures*

The arrangement of names and signatures, although it may seem a minor part, sometimes presents difficulties in the case of multilateral agreements. There may be variations of arrangements, depending on particular factors, but the arrangement most generally used is alphabetical according to the names of the countries concerned. An alphabetical listing, however, presents the further question, even when there are only two languages, of what language is to be used in determining the arrangement. It is a common practice to use the language of the host government or for an agreement formulated under the auspices of an international organization, to follow the precedents established by that organization. It is possible, in the event that agreement could not be reached regarding the arrangement of names of countries and signatures of plenipotentiaries, to have a drawing of lots, a device seldom used. In any event, the question is one to be determined by the conference.

742.3 *Conformity of texts*

It is the primary responsibility of the delegations, acting in conference, to determine the conformity of the agreement texts which are to be signed. However, the conference secretariat has a responsibility for checking the texts carefully to ensure that, when put in final form for signature, the texts are in essential conformity.

743 *Full powers*

In the case of a multilateral agreement drawn up at an international conference, this Government customarily (almost invariably, in the case of a treaty) issues to one or more of its representatives at the conference an instrument of full power authorizing them to sign the agreement on behalf of the United States. In some instances, issuance of the full power is deferred until it is relatively certain that the agreement formulated is to be signed for the United States. (See section 733.) Ordinarily, that full power is presented by the representatives to the secretary general of the conference upon arrival of the delegation at the conference site. It may be submitted in advance of arrival, but usually that is not necessary. When the conference has formally convened, it usually appoints a credentials committee, to which all full powers and other evidence of authorization are submitted for examination. The full powers and related documents are retained by the credentials committee or the secretary general until the close of the conference. At the close of the conference, the full powers, related documents, and the signed original of the agreement are turned over to the government or the international organization designated in the agreement as the depositary authority, to be placed in its archives.

744 *Signature and sealing (see also section 734)*

744.1 *Signature*

Most multilateral agreements are signed. Some, however, are adopted by a conference or organization after which governments become parties by adherence, accession, acceptance or some other method not requiring signature (e.g., conventions drawn up and adopted at sessions of the International Labor Organization). Procedures for the deposit of an instrument of adherence, accession, or acceptance are similar to procedures for the deposit of instruments of ratification. In some cases, accession or approval can be accomplished by formal notice through diplomatic channels.

744.2 *Seals*

Multilateral treaties do not usually provide for the use of seals along with the signatures of representatives. The large number of signatures would make the use of seals difficult and cumbersome.

745 *Disposition of final documents of conference*

745.1 *Signed originals*

At the close of a conference, the remaining supply of working documents (e.g., records of committee hearings, verbatim minutes, etc.) usually is placed in the custody of the host government or the organization which called the conferences for appropriate disposition. It is not proper for definitive commitments constituting part of the agreement to be embodied in such working documents. Definitive commitments must be incorporated only in a final document to be signed or adopted as an international agreement. The final documents of the conference may include a final act (see section 740.2-5) and, separately the text(s) of agreement(s). The practice of signing a final act is still followed in many cases. In any event, any agreement formulated at the conference must be engrossed as a separate document and signed or adopted. The signed or adopted originals of the final documents of the conference are turned over to the government or international organization designated in such documents as depositary. If the conference is not held under the auspices of an organization, it is customary for the host government to be designated depositary, but it might be appropriate, even in such case, to name an organization, such as the United Nations, as depositary. The decision is made by the conference.

745.2 *Certified copies*

Upon taking custody of the signed or adopted original(s) of the final document(s), the depositary is charged with the responsibility of preparing and sending to each of the governments concerned certified copies thereof. When the conference is held abroad, the certified copies are usually sent to the mission for transmission to the Department. The United States Government, when depositary for a multilateral instrument, always furnishes at least two certified copies to each of the governments concerned. The United States Government itself requires two certified copies of each agreement, one to be retained in its archives and the other (commonly called the "deposit copy") to be embodied in a duplicate original of this Government's instrument of ratification which is transmitted to the depositary for deposit with the original of the agreement.

746 *Procedure following receipt by the Department*

746.1 *Understandings or reservations*

If it is necessary to inform other governments concerned, and perhaps obtain their consent, with respect to an understanding or reservation imposed by the Senate in its advice and consent, this Government communicates with the depositary, which then carries on the necessary correspondence with the other governments concerned.

746.2 *Deposit of ratification*

When the depositary for a multilateral agreement is a foreign government or an international organization, the United States instrument of ratification (or adherence, accession, acceptance, etc.) is sent by the Department to the appropriate Foreign Service mission or to the United States representative to the organization if there is a permanent representative. The mission or the representative deposits it with the depositary authority in accordance with the terms of the accompanying instruction from the Department concerning the time of deposit. When this Government is depositary for a multilateral agreement, posts are not authorized to accept instruments or ratification of foreign governments, i.e., the foreign government cannot deposit its instrument with the post. If a post is requested to transmit an instrument of ratification to the Department, it must make clear to the foreign government that the post is acting only as a transmitting agent and that the ratification cannot be considered as accepted for deposit until received and examined by the Department.

746.3 *Registration* (see also section 736.4-2)

It is generally recognized that the depositary for a multilateral agreement has a primary responsibility for such registration. Normally, the depositary has custody not only of the original document of agreement but also of instruments of ratification and other formal documents. Consequently the depositary is the most authoritative source of information and documentation.

746.4 *United States as depositary*

Inquiries from foreign diplomatic missions at Washington and from American diplomatic missions abroad with respect to the preparation or deposit of instruments relating to any multilateral agreement of which the United States is depositary are referred to the Assistant Legal Adviser for Treaty Affairs. That officer is to be notified immediately of the receipt of any such document anywhere in the Department, inasmuch as a depositary is required to ascertain whether those documents are properly executed before accepting them for deposit, to keep accurate records regarding them, and to inform other governments concerned of the order and date of receipt of such documents.

DEPARTMENT OF STATE, DEPARTMENT CIRCULAR No. 175, DECEMBER 13, 1955

Note: This Circular superseded by 11 *Foreign Affairs Manual*, Chapter 700—Treaties and Other International Agreements (circular 175 procedure), June 6, 1969.

Subject: 1. Proper Exercise of: (1) The Treaty-Making Power of the United States; and (2) The Executive Agreement-Making Power of the United States. II. Approval of Texts and the Making of Arrangements for Signature.

1. PURPOSE OF CIRCULAR

1.1 The purpose of this circular is to insure (a) that the function of making treaties and other international agreements is carried out within traditional and constitutional limits; (b) that the objectives to be sought in the negotiation of particular treaties and other international agreements are approved by the Secretary or Under Secretary; (c) that firm positions resulting from negotiations are not undertaken without the approval of the interested Assistant Secretaries or their Deputies; (d) that the final texts developed are approved by the interested Assistant Secretaries or their Deputies and brought to the attention of the Secretary or Under Secretary a reasonable time before signature; and (e) that authorization to sign the final text is secured and appropriate arrangements for signature are made.

1.2 It is a further purpose of this circular to insure that full implementation shall be given to the policy stated in the Secretary's testimony before the Senate Committee on the Judiciary on April 6, 1953, in which he said:

"The Constitution provides that the President shall have power to make treaties by and with the advice and consent of the Senate. This administration recognizes the significance of the word 'advice'. It will be our effort to see that the Senate gets its opportunity to 'advise and consent' in time so that it does not have to choose between adopting treaties it does not like, or embarrassing our international position by rejecting what has already been negotiated out with foreign governments."

"... I am authorized by the President to advise this Committee, the Senate Foreign Relations Committee, and the House Foreign Affairs Committee as follows:

"It has long been recognized that difficulties exist in the determination as to which international agreements should be submitted to the Senate as treaties, which ones should be submitted to both Houses of the Congress, and which ones do not require any Congressional approval.

"... the Congress is entitled to know the considerations that enter into the determinations as to which procedures are sought to be followed. To that end, when there is any serious question of this nature and the circumstances permit, the Executive Branch will consult with appropriate Congressional leaders and Committees in determining the most suitable way of handling international agreements as they arise.

2. SCOPE OF THE TREATY-MAKING POWER

Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States. Treaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.

3. SCOPE OF THE EXECUTIVE AGREEMENT-MAKING POWER

Executive agreements shall not be used when the subject matter should be covered by a treaty. The executive agreement form shall be used only for agreements which fall into one or more of the following categories:

- a. Agreements which are made pursuant to or in accordance with existing legislation or a treaty;
- b. Agreements which are made subject to Congressional approval or implementation; or
- c. Agreements which are made under and in accordance with the President's Constitutional power.

4. SCOPE OF AUTHORIZATION TO NEGOTIATE

Approval of a request for authorization to negotiate a treaty or other international agreement does not constitute advance approval of the text nor authorization to agree upon a date for signature or to sign the treaty or agreement. Authorization to agree upon a given date for, and to proceed with, signature must be specifically requested in writing, as provided in Section 5.5. This applies to treaties and other agreements to be signed abroad as well as those to be signed in Washington. Special instructions may be required, because of the special circumstances involved, with respect to multilateral conventions or agreements to be signed at international conferences.

5. ACTION REQUIRED

5.1 *Commencement of negotiations for new treaties and executive agreements*

Negotiations of new treaties, or new executive agreements on matters of substance, are not to be entered into until authorized in writing by the Secretary or the Under Secretary. (This situation is to be distinguished from the case where a draft of an international convention may be formulated or considered in meetings of an international organization of which the United States is a member. In that event, the appropriate procedure is a position paper for the U.S. Delegation which should be cleared with the Secretary or Under Secretary. Any such conventions formulated are subject to the provisions of Section 5.5 before they are signed for the United States and to Section 5.9.)

5.2 *Questions as to treaty or executive agreement form*

Where there is any serious question as to whether an international agreement should be made in the form of a treaty or in the form of an executive agreement made by the President alone or with the consent of both Houses of Congress, the matter shall be brought to the attention of the Secretary by a memorandum prepared by the officer responsible from the contemplated negotiations. This memorandum shall first be routed to the Legal Adviser and the Assistant Secretary for Congressional Relations for their clearance and comment. Thereafter, whenever circumstances permit, consultation shall be had with appropriate Congressional leaders and committees in determining the most suitable way of handling such international agreements, such consultation to be had by the office responsible for the negotiations with the assistance of the Assistant Secretary for Congressional Relations.

5.3 *Exercise of authority to negotiate*

a. Where authorization is given for the negotiation of a treaty or other agreement, or a series of treaties or agreements by blanket authorization, the office responsible for the negotiations shall inform I-/T in each instance as soon as negotiations are undertaken with a particular country.

b. Purely operational arrangements, such as Form 10-5 ICA project agreements, procurement authorizations and cash contribution agreements, need not be reported where they are in implementation of an existing international agreement.

5.4 *Conduct of negotiations*

The office responsible for any negotiations shall assure:

a. that during the negotiations no position is communicated to a foreign government as a United States position that goes beyond any existing authorization or instructions;

b. that no proposal be made or position be agreed to beyond the original authorization without approval by the appropriate Assistant Secretaries or their Deputies, and also, in the case of treaties or other international agreements which concern responsibilities of ICA, the Director of ICA or his Deputy;

c. that all significant policy-determining memorandums and instructions to the field on the subject of the negotiations are submitted to and cleared by all Assistant Secretaries concerned or their Deputies, and also, in the case of treaties or other international agreements which concern responsibilities of ICA, the Director of ICA or his Deputy;

d. that the Secretary or Under Secretary is kept informed in writing of important policy decisions and developments, including any particularly significant departures from substantially standard drafts that have been evolved;

e. that, with the advice and assistance of the Assistant Secretary for Congressional Relations, the appropriate Congressional bodies are kept advised of the intention to negotiate any especially significant treaties or executive agreements and of any important developments thereon; and

f. that, in any case where any other agency participates in negotiations, the official or officials representing such agency in the negotiations shall be informed appropriately of the requirements herein as they apply to such negotiations.

5.5 Transmission of texts to Secretary; approval and authorization to sign

The texts of treaties and other international agreements should be completed and approved in writing by all responsible officers concerned sufficiently in advance to give the Secretary or Acting Secretary, or the person to whom authority to approve the text has been delegated, adequate time before the date of signing to examine the text and dispose of any questions that arise. Except as otherwise specifically authorized by the Secretary or the Acting Secretary, a complete text of a treaty or other international agreement shall be delivered to the Secretary or the Acting Secretary, or other person authorized to approve the text, before any such text is agreed upon as final or any date is agreed upon for its signature. The text (including the complete text of any annex, schedule, exchange of notes, or other related document) shall be accompanied by a memorandum requesting authorization to make arrangements for signature of that text. The memorandum shall indicate the approval in writing of (a) the Assistant Secretary primarily responsible for the subject involved, and also, in the case of treaties or other international agreements which concern responsibilities of ICA, the Director of ICA or his Deputy; (b) the Legal Adviser, as to legality and form; (c) other Departmental clearances as required; and (d) if any other agency has primary responsibility for or substantial interest in the subject (for example, aviation, copyrights, patents, taxation, military base rights), a high ranking officer of that agency.

5.6 Exercise of delegated authority to sign

Where the Secretary or the Acting Secretary has delegated authority to sign, or to approve the signature of, an agreement or series of agreements, including significant exchanges of notes, any officer, other than the Under Secretary, exercising such authority shall immediately report in writing to the Secretary the fact that such agreement was signed and the name and position of the representative or representatives who signed on behalf of the other government or governments with which the agreement was concluded.

5.7 Engrossing of documents for signature

Before the text of a treaty or other formal agreement, including any related documents to be annexed or signed, is engrossed for signature in the Department, written approval of that text by the Assistant Secretary responsible for the subject involved shall be obtained. In the case of treaties or other international agreements which concern responsibilities of ICA, the approval of the Director of ICA or his Deputy shall also be required. Adequate time (normally 7 business days) shall be allowed for the engrossing (typing on treaty paper), comparing, etc., of the treaty or other single document agreement to be signed, in order to assure sufficient time for the preparation of accurate texts in duplicate for signature, including, in the case of documents to be signed in a foreign language, sufficient time for the Division of Language Services to prepare any translations required, check any existing foreign-language draft, and check

the engrossed foreign-language text. The determination of the amount of time required in each instance to complete the engrossing is the responsibility of the Assistant Legal Adviser for Treaty Affairs.

5.8 Certificate on foreign-language text

Before any treaty or other agreement containing a foreign-language text is laid before the Secretary or the Acting Secretary (or any person authorized by either of them) for signature, a signed memorandum shall be obtained from a responsible language officer of the Department certifying that the foreign-language text and the English language text are in conformity with each other and that both texts have the same meaning in all substantive respects.

5.9 Transmission of texts for publication

The office responsible for the negotiation of a treaty or other agreement is also responsible for assuring the most expeditious transmission of the signed original text, together with all accompanying papers such as agreed minutes, exchanges of notes, plans, etc., to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs, Office of the Legal Adviser; provided that where originals cannot be sent accurate certified copies should be obtained and transmitted as in the case of the original (see 4 FSM 226.1, 226.2, 226.3 and 227.43). Any officer in the Department having in his possession or receiving from any source a signed original or certified copy of a treaty or agreement or of a note or other document constituting a part of a treaty or agreement shall forward such documents immediately by special messenger to the Assistant Legal Adviser for Treaty Affairs (L/T), in order that processing for publication may take place at once.

6. CANCELLATION

This Circular supersedes Department Circular No. 25 of May 15, 1953.

**S. 3475—TO HELP PRESERVE THE SEPARATION OF
POWERS AND TO FURTHER THE CONSTITUTIONAL
PREROGATIVES OF CONGRESS BY PROVIDING FOR
CONGRESSIONAL REVIEW OF EXECUTIVE AGREE-
MENTS**

FRIDAY, MAY 19, 1972

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senator Ervin (presiding).

Also present: Rufus L. Edmisten, chief counsel and staff director; Joel M. Abramson, minority counsel; Walker F. Nolan, Jr., assistant counsel; and Philip B. Kurland, chief consultant.

Senator ERVIN. The subcommittee will come to order. Counsel will call the first witness.

Mr. EDMISTEN. Mr. Chairman, the first witness this morning is the Honorable Ralph E. Erickson, Office of Legal Counsel, Department of Justice, and he is accompanied by a gentleman he will introduce for the record.

Senator ERVIN. I want to welcome both of you gentlemen to the committee and express our appreciation for your willingness to come to us and give us the benefit of your views on this important subject.

**STATEMENT OF HON. RALPH ERICKSON, OFFICE OF LEGAL
COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY JACK
GOLDKLANG, ATTORNEY, OFFICE OF LEGAL COUNSEL**

Mr. ERICKSON. Mr. Chairman, I am pleased to be here this morning. I would like to introduce the gentleman on my right, Jack Goldklang, an associate from the Office of Legal Counsel.

Mr. Chairman, I appreciate this opportunity to appear before you to discuss the legal aspects of "executive-legislative relations in foreign affairs" with particular reference to executive agreements.

When S. 3475, which proposes a new role for Congress in connection with executive agreements, was introduced you expressed the concern that the Founding Fathers' concept of shared powers in the area of international agreements had been substantially eroded by the use of executive agreements. (118 Cong. Rec. S 5787). In light of

that expressed concern, I would like today to provide the committee with some general observations regarding international agreements together with our views on the legal aspects of executive agreements. Thereafter I will address myself specifically to S.3475, which we oppose as not being constitutional.

It will be useful, I believe, to begin with a brief discussion of the treaty-making power. In recent years statements have been made by Members of the Senate as to the intentions of the Framers concerning treaties. These statements deserve analysis. For example, in the debate over agreements made with Portugal and Bahrain, Senator Case asserted:

The Constitution does not define the term "treaty". Yet, it seems clear that the Founding Fathers intended any agreement with a foreign country on a matter of substance to be embraced within the term. (118 Cong. Rec. S 3286, March 3, 1972.).

We can find no evidence for Senator Case's contention if it is taken to mean that all international agreements on matters of substance must take the form of a treaty. The available records of the Constitutional Convention do not indicate that any question was raised concerning the scope of the term "treaty", or that a treaty was to be the only means for concluding agreements on matters of substance. Although it was suggested, when S. 3475 was introduced, that the treaty is the only kind of international instrument mentioned in the Constitution (118 Cong. Rec. S. 5787), an examination of its text does not support this. In the vocabulary of the Framers, the term "treaty" did not cover every type of arrangement with a foreign nation. Article I, section 10, carefully distinguishes between a "treaty, alliance and confederation," which the States are absolutely prohibited from entering, and an "agreement or compact * * * with a foreign power" which the States may make provided they obtain the consent of Congress. The draftsmen of the Constitution thus recognized a distinction between treaties and agreements. Chief Justice Taney stated that difference as follows, quoting from Vattel, a scholar on international law well known to American lawyers during the period of the Revolution:

"A treaty * * * is a compact made with the view to the public welfare, by the superior power, either for perpetuity, or for a considerable time.* * *

"The compacts which have temporary matters for their object, are called agreements, conventions and pactions. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution, once for all; treaties receive a successive execution, whose duration equals that of the treaty." *Holmes v. Jennison*, 39 U.S. 540, 572 (1840).

In some ways the best evidence of the Framers' intention not to limit international agreements to treaties lies in the usage of executive agreements in the early days of the Republic. The Post Office Act of 1972 authorized the Postmaster General to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post offices." 1 Stat. 232, 239. These were plainly not treaties in the constitutional sense. If they had been, congressional authorization would have been

of no avail to the President in the absence of the advice and consent of two-thirds of the Senators present. It is also worthy of note that the courts have rejected the contention that executive agreements authorized by statute violate the Constitution because they impinge on the treaty power. See *Star-Kist Foods, Inc. v. United States*, 169 F. Supp. 268 (Cust. Ct. 1958), and cases collected therein. In *Field v. Clark*, 143 U.S. 649 (1892), the Supreme Court upheld an act permitting the President to change duties on certain imports. The first Mr. Justice Harlan noted the well-established practice of granting discretion of this kind to the Executive in matters relating to trade with other nations, when he stated:

"* * * the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land." 143 U.S. at 691.

It has been said by an eminent authority that between 1789 and 1939 over 1,300 international agreements based on various types of authority were consummated without the participation of the Senate. E. Corwin, *The President: Office and Powers* 422 (1957). It, therefore, seems plain to me that there is no validity at all to the claim that the executive agreement as a method of international dealings is beyond the powers authorized by the Constitution.

Turning then to the permissible uses of the executive agreement, it is the firmly established policy of the executive branch that executive agreements should not be used when the subject matter should be covered by a treaty; there must be a constitutional source of authority for the agreement. As stated in the *Foreign Affairs Manual* of the Department of State, the executive agreement form is used only for agreements which are made: (a) pursuant to or in accordance with existing legislation or a treaty; (b) subject to congressional approval or implementation; or (c) under and in accordance with the President's constitutional power. See 11 *Foreign Affairs Manual* 722; 14 M. Whiteman, *Digest of International Law* 195 (1970).

Basically, the making of executive agreements involves a procedure which is supervised primarily by the Department of State. In this connection I should inform the committee that it is not a regular practice for the Department of Justice to be consulted in the making of such agreements, although there are occasions when we are called upon to discuss specific related legal questions.

Questions of separation of powers are not likely to be raised in Congress concerning agreements based on treaties or statutes since Congress or the Senate alone has, by express delegation, empowered the Executive to make them. Apparently the issue of authority tends to arise most often where the Constitution or implied constitutional powers are the source of the President's authority. An executive agreement made by the United States, which does not rely for authority on a treaty or act of Congress, may deal with any matter that under the Constitution falls within the independent powers of the President. Restatement (Second), *Foreign Relations Law of the*

United States, § 121 (1965); 14 M. Whiteman, *Digest of International Law* 195 (1970).

The independent authority of the President to make executive agreements is based on a number of express constitutional provisions including the following:

The executive power shall be vested in a President of the United States of America. Art. II, Section 1;

The President shall be Commander in Chief of the Army and Navy * * *. Art. II, Section 2; and

[H]e shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed * * *. Art. II, Section 3.

The President also derives constitutional power in his role as Chief Executive to make executive agreements based on attributes of the sovereignty of the United States. In other words, the United States can act in the international field to the same extent as other sovereign nations do. The classic exposition of this concept appears in the opinion of the Supreme Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936):

* * * the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality. * * * As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation * * * the power to make such international agreements as do not constitute treaties in the constitutional sense * * * none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. (Emphasis added.)

As the State Department has indicated, the number of agreements based solely on the constitutional authority of the President is relatively small. One type of agreement where that power is exercised is recognition of foreign governments, based on the constitutional power of the President to "receive ambassadors and other public ministers"; another is the settlement of foreign claims. The *Curtiss-Wright* opinion has been followed in subsequent decisions which have upheld the President's power to make executive agreements in these two areas. In *United States v. Belmont*, 301 U.S. 324 (1937), the Supreme Court upheld the validity of an executive agreement not based on any preexisting treaty or statute, which established relations with the Soviet Union and settled certain claims by assignment of assets to the United States. The Court said:

Governmental power over external affairs is not distributed, but is vested exclusively in national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.

* * * an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a *modus vivendi*, a postal convention, and agreements like that now under consideration are illustrations. 301 U.S. at 330.

Similar language was used by the Supreme Court in *United States v. Pink*, 315 U.S. 203, 229 (1942).

Furthermore, some power to make executive agreements can be implied from the treaty power. Although treaties require the concurrence of the Senate, as *Curtiss-Wright* and *Belmont* indicate the President alone negotiates. In the course of negotiating a treaty, it is sometimes necessary to conclude an interim arrangement or *modus vivendi* until the treaty is finally ratified. See *United States v. Belmont*, *supra* at 330.

The President also may make agreements based on his power as Commander-in-Chief. Controversy in this area has been relatively recent. A point of departure often mentioned is 1940, when the United States was being increasingly thrust into the international arena. Britain, having sustained heavy losses, appealed for American destroyers. President Roosevelt asked Attorney General Jackson for his opinion regarding the authority for effectuating by executive agreement an exchange of American destroyers for British bases in the Western Hemisphere.

The Attorney General concluded that the agreement could be made without submitting it to the Senate as a treaty for its advice and consent. 30 Ops. A.G. 484 (1940). The President's authority was deemed to derive from his constitutional powers as Commander-in-Chief and from "that control of foreign relations which the Constitution vests in the President as part of the Executive function," citing *Curtiss-Wright*, *supra*, 39 Ops. A.G. at 486.

Since no future "commitment" was involved, Attorney General Jackson held that the agreement did not require the advice and consent of the Senate. According to that opinion:

* * * Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future. The consideration, which we later discuss, is completed upon transfer of the specified items. The Executive agreement obtains an opportunity to establish naval and air bases for the protection of our coastline but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation. 39 Ops. A.G. at 487.

One scholar who commented on Attorney General Jackson's opinion stated:

While there is no clear line between the subjects on which the President can enter into agreements under his constitutional powers to conduct foreign relations and those on which he must ask the advice and consent of the Senate, it appears that the prime consideration is whether the agreement imposes legal obligations upon the United States beyond the independent power of the President to fulfill. If the aid of Congress is necessary for fulfillment, the President should, before finally approving the instrument, either get the advice and consent of the Senate, thus making it a treaty in the constitutional sense, or he should get an authorizing act from Congress making appropriations or enacting legislation to fulfill such obligations. Since the present agreement imposed no such obligation requiring congressional action, neither of these procedures was necessary. Editorial Comment, Q. Wright, *The Transfer of Destroyers to Great Britain*, 34 Am. J. Int'l L., 680, 681 (1940).

In the last few years there has been a growing number of occasions when the executive and the Senate have disagreed on the scope of the President's powers to conclude executive agreements relating

to the war power. Given the fact that there is no simple answer to the question of the precise magnitude of the independent powers of the President, each dispute has itself become part of both the lore and the legal precedent on this subject.

For example, in June 1969, the Senate debated and adopted a "sense of the Senate" resolution that the use of armed forces on foreign territory or a promise to assist a foreign government by American military or financial resources can only be achieved by a treaty, statute or concurrent resolution. S. Res. 85, 91st Cong., 1st Sess., 115 Cong. Rec. 17214-17245.

Also, in 1970 debate arose as to whether the proposed Friendship and Cooperation Agreement with Spain should be submitted to the Senate as a treaty (T.I.A.S. No. 6924). That debate focused largely on the question of the effect of the agreement, that is, did it constitute a military commitment by the United States to Spain? The Administration's position was that it did not constitute a commitment, while Senator Fulbright, among others, challenged the Administration's position, and argued that if his interpretation was correct, then the matter was of sufficient importance to require the concurrence of the Senate. As a subsequent resolution passed by the Senate demonstrated, the issues raised did not in any realistic sense relate to the law or constitutional practice concerning the right of the President to make agreements for bases as much as they did to the meaning of the agreements. See S. Rep. No. 91-1425 on S. Res. 469.

It is difficult for us as lawyers to state the "holding" of each of the debates. Indeed, they emphasize the importance of the Executive dealing with these matters on a case-by-case basis. It is against this background that we must view S. 3475.

Accordingly, I think it now appropriate to turn to some specific comments on S. 3475. You, Mr. Chairman, have stated that the bill is designed to "help restore the balance of power between the executive and legislative branches of the government in the area of international agreements." S. 3475, you state, would also further the constitutional prerogatives of Congress by requiring transmission of all executive agreements to both houses of Congress. In general, executive agreements would come into force 60 days after transmittal unless, prior to the expiration of the 60-day period, both houses of Congress pass a concurrent resolution disapproving the executive agreement.

I believe that this proposal, although intended to resolve a constitutional problem, presents substantial constitutional problems of its own.

The President has independent power under the Constitution to conclude executive agreements. For example, as I have noted, he has specific constitutional power to "receive Ambassadors" (Art. II, Section 3), and thus to recognize foreign governments. Under his power as Commander-in-Chief, he has the right to make operational arrangements, such as cease-fire agreements to insure the safety of troops which have been placed at his disposal. *Cf. Ex parte Milligan*, 71 U.S. 2, 139 (1866). In my opinion, Congress cannot by statute take away or substantially limit this power. Further, if the Pres-

ident sent an agreement to Congress which he did not have authority to make, it is doubtful that the failure of Congress to disapprove the agreement could give it a validity it would not otherwise have.

Similarly, if the President has authority, either by statute or treaty, to enter an executive agreement, that power continues until the statute is repealed or the treaty is no longer in force.

It is also our position that Congress cannot, in fact, take legally binding action against any of these exercises of authority by concurrent resolution. This is not a legislative process which finds recognition in the Constitution. Although there are some legislative precedents which exist in the field, such as the Atomic Energy Act, 42 U.S.C. 2153(d), we are not aware of judicial decisions supporting the practice.

In view of these legal considerations, particularly the constitutional infirmity, we respectfully recommend against enactment of S. 3475. The very source of the President's powers suggests that the determination of whether an international arrangement is to be effected by treaty or executive agreement should be resolved by the existing sound and traditional constitutional process. The criteria established by the State Department call for consideration, as a matter of policy, of relevant non-legal factors, such as the role of tradition, formality and importance of obligations, on the one hand, and the breadth of the President's legal authority on the other. 14 Whiteman, Digest of International Law 209 (1970). As a basic legal proposition, however, it is our firm position that the President is and must remain free of statutory limitations on his independent constitutional powers to enter into international agreements.

Thank you, Mr. Chairman.

Senator ERVIN. I do not know whether I construe your argument right but you take section 10 of the Constitution which prescribes limitations upon the State—provisions that no State shall enter into any treaty, alliance, or confederation and no State shall without the consent of Congress enter into any regional compact with another State, as not simply limiting the powers of the States, but as expanding the powers of the President. Is that a correct statement of your argument?

Mr. ERICKSON. No, that is not correct. That is an illustration of the distinction between an agreement and a treaty.

Senator ERVIN. But is there a single express provision in the Constitution recognizing the power of the United States to enter into an agreement with another nation other than the provision of section 2 of article 2, that the President shall have the power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur?

Mr. ERICKSON. I am sorry, Senator. Would you—

Senator ERVIN. Is there a single express provision in the Constitution authorizing the United States to make any agreement with a foreign nation other than provision of section 2 of article 2 authorizing the President by and with the advice and consent of the Senate to make a treaty?

Mr. ERICKSON. Well, that certainly is the source of the treaty power. I have no question about that. I think in the course of my

statement I have indicated the other sources which we consider the bases for the President's authority or the Executive's authority to enter into executive agreements.

Senator ERVIN. Well——

Mr. ERICKSON. You ask if they are express?

Senator ERVIN. Yes.

Mr. ERICKSON. They are express in the sense that we are relying upon the express powers of the President. Nowhere do we find words expressly giving the President power to make executive agreements.

Senator ERVIN. The power of the President to make an executive agreement is not expressed at all anywhere in the Constitution. It has been implied from other powers which are expressed, does it not?

Mr. ERICKSON. The word "agreement" does not expressly appear in the powers granted to the Executive.

Senator ERVIN. That is right.

Mr. ERICKSON. That is not our position.

Senator ERVIN. You quote at length the *Curtiss-Wright* case.

Mr. ERICKSON. Yes.

Senator ERVIN. My own opinion is that the *Curtiss-Wright* case is just an emulative example that some people talk too much. Mr. Justice Sutherland went too far in his opinion. Do you actually accept his theory that the President has powers in the international field which are not express or impliedly stated in the Constitution?

Mr. ERICKSON. I think these powers are implied in the Constitution in the sense that the powers that are given to the Executive in the Constitution necessarily permit the implication.

Senator ERVIN. Well, Judge Sutherland says in effect that President has inherent powers that are not to be determined by any express or implied provisions of the Constitution. He says flatly that the United States as a sovereign has any power in the international field that any other country on the face of the earth possesses, does he not?

Mr. ERICKSON. Well, Mr. Chairman, our position is, I suppose, one of semantics in part, but I do not dispute the fact that we are relying upon the Constitution itself in this context.

Senator ERVIN. Well, I am thinking about the *Curtis-Wright* case. Frankly, it seems, with all due respect to Justice Sutherland, who ordinarily was a very careful writer, that he took a flight far beyond the intellectual stratosphere when he wrote that opinion, and it is inconceivable to me that the Federal Government or any department of the Federal Government has any power which is not either expressly or impliedly stated in the Constitution.

Mr. ERICKSON. Well, I would accept that general proposition. I would state further, however, that here we are relying upon the powers that derive from the President's capacity as Chief Executive, which are certainly well founded and based upon the Constitution.

Senator ERVIN. Well, you say you accept that as a general proposition. Can you state any exceptions to that proposition?

Mr. ERICKSON. I did not mean to indicate exceptions to it. I am just simply stating as a general proposition we are in this specific case relying on the extensive powers, and in many cases exclusive

powers, of the President in the conduct of foreign affairs as Chief Executive.

Senator ERVIN. Do you think the words "executive power" give the President anything to do except to carry out the laws of the United States—the Constitution and laws of the United States—to faithfully see that they are executed?

Mr. ERICKSON. No, I do not.

Senator ERVIN. In other words, I reject, as I understand it, the doctrine of inherent power. I do not think the President or the Congress have any powers except those expressly or impliedly given by the Constitution. In fact, I think the Constitution was written to make it certain that the President did not have any such powers. I hope you do not disagree with me on that.

Mr. ERICKSON. I think if there is a disagreement, we disagree to the extent of what powers flow from the grant of express powers to the President, the Executive power, and the scope of the implied powers.

Senator ERVIN. I have no objection to implied powers but I do object to the idea that there are inherent powers that exist outside of the Constitution.

Now, I am much intrigued by the reliance on the opinion of Justice Jackson when he was Attorney General in respect to the 50 over-age destroyers. I have great difficulty reconciling that opinion which he gave the President as the Presidents' lawyer, with the concurring opinion he wrote, as a justice of the Supreme Court, in the *Steel Seizure* case. If you can reconcile the two, I would be awfully glad to have you do it because I think the two things are irreconcilable.

Mr. ERICKSON. Well, I would say that in the *Steel Seizure* case, 343 U.S. 579 (1952), we are dealing as may so often be the case, with general observations of the relationships of the executive and legislative branches of the Government. The opinion rendered by Mr. Justice Jackson when he was Attorney General goes to the specific point of an executive agreement and certainly I would be prepared to accept his opinion as expressed in his opinion while Attorney General as not being inconsistent with his opinion in the *Steel Seizure* Case.

Senator ERVIN. As I construe Justice Jackson's opinion as Attorney General, he said the power of the President as Commander-in-Chief gave him the power to give away without the consent of the Congress. 50 destroyers. Is that not what it says when you reduce it down to its bare essentials?

Mr. ERICKSON. I am sorry. I did not get the question.

Senator ERVIN. I say, the way I construe the opinion which Justice Jackson gave the President when he was the President's lawyer, instead of a Justice of the Supreme Court, is that, he said the power of the President as Commander-in-Chief gave the President the right to give away the 50 destroyers without the consent of the Congress.

Mr. ERICKSON. Well, yes. He was certainly relying upon the President's powers as Commander-in-Chief and I think also the Executive's power, in connection with the conduct of foreign relations.

Senator ERVIN. Do you not have a little difficulty with the theory that the President's powers as Commander-in-Chief of the Navy gives the President the power to give away the Navy? Does that not give you some pause?

Mr. ERICKSON. That is one part of it. There is the further factor that this was the implementation of a foreign policy.

Senator ERVIN. This—

Mr. ERICKSON. In other words, Justice Jackson, I think—

Senator ERVIN. This is his foreign policy as Commander-in-Chief. I find great difficulty in accepting the position that the President's power as the Commander-in-Chief of the Navy, gives him the power to give away the Navy without the consent of Congress.

Mr. ERICKSON. I think that bold proposition, that single proposition causes me some concern, too, but in the context in which it was done here, it is quite different.

Senator ERVIN. I do not disapprove of the President doing that, but I think it was a gross usurpation of power and I think the excuse that his Attorney General gave him to justify it was purely a specious consideration.

Mr. ERICKSON. Well, as I am sure you realize, there were two sides to it.

Senator ERVIN. Yes, the right side and the wrong side.

Mr. ERICKSON. This was based on an exchange for bases.

Senator ERVIN. The constitutional side and nonconstitutional side.

Mr. ERICKSON. No, I would not relegate it to that point. I am saying that the obsolete destroyers were transferred in exchange for rights to certain bases.

Senator ERVIN. If he can give away 50 destroyers I do not see why he cannot give away the State of Texas without asking the consent of Congress.

Mr. ERICKSON. Mr. Chairman, I cannot concede that he gave them away. I think this was an international bargain or agreement.

Senator ERVIN. It was an international bargain made by the Commander-in-Chief by executive agreement, without the consent of Congress by which the President gave away a substantial part of the Navy in return for some bases, and I find great difficulty with it.

Mr. ERICKSON. And I think we have to assume that the President at that time felt that those bases were important for the protection of our Nation.

Senator ERVIN. I think he thought it was necessary for the protection of England and I think that was a correct conclusion at the particular time.

Now, it is your position that there is no valid legislation which Congress can enact in the field in which the powers given by the Constitution to the President give him the right to conclude an international agreement without the consent of Congress?

Mr. ERICKSON. Oh, I think there is certainly an area where there is a concurrent authority.

Senator ERVIN. But would not the necessary and proper clause which empowers Congress to enact any legislation necessary or appropriate to carry out the powers of the President give Congress the power to pass legislation which would require the President to make

known to the Congress any agreement, any executive agreement, he made with another nation even in fields like that covered by the *Pink* and *Belmont* cases?

Mr. ERICKSON. Oh, I do not have a great deal of difficulty with the proposition that the necessary and proper clause can be the basis for a power to enact legislation which would relate to the exercise of the President's power. The concern I have is where that legislation would be so broad as to limit the President's powers.

Senator ERVIN. But as I take it, then, you think that Congress can prescribe some procedure by which the President's power is to be exercised, provided the procedure does not limit his exercise of the power.

Mr. ERICKSON. I think the important thing is that they not limit the President's power and procedures could have that effect, of course.

Senator ERVIN. Would not Congress have the power in your judgment, to enact legislation that would require the President to inform the Congress that he had made an executive agreement with a foreign nation in a field in which the power of the President to make that agreement is exclusive?

Mr. ERICKSON. Yes. To enact a statute which would require advice that an agreement has been concluded would certainly be within that power; however, as I have just noted such a statute could not be applied in such a manner as to limit the President's power.

Senator ERVIN. Now, you question the legal or constitutional accuracy of Senator Case's statement, that the Constitution contemplates that every agreement between the United States and a foreign nation involving a matter of substance shall be presented to the Senate in the form of a treaty rather than made by an executive agreement. Do you challenge the accuracy of that?

Mr. ERICKSON. Yes. I am challenging it in a sense that I am not exactly sure what it means. You will recall a part of the quote I used referred to—

It seems clear that the Founding Fathers intended any agreement with a foreign country on a matter of substance be embraced within the term.

The term being "treaty".

Now, substance in that context bothers me, if he means any agreement of any significance at all. I do not consider that to be the constitutional test.

Senator ERVIN. Well, are you able to give us any test? The word "substance" is not a very precise word.

Mr. ERICKSON. Mr. Chairman, I sincerely wish that I could give you a clear cut test. As you know, it is very difficult. I tried, in the course of my statement, to present what I think are the general parameters and the comparatively easy questions within the President's exclusive or independent powers. On the other side, there are those that obviously should be concluded by treaty; but the in-between ground is rather rough. And that is the area where the definition would be helpful and that is where it is most difficult to come out with an express definition.

Senator ERVIN. Do you think Congress would have the power, under its legislative power, especially under the necessary and proper clause, to prescribe what types of agreement should be made by treaty?

Mr. ERICKSON. No. I think there you run straight into the question of whether you are specifying whether or not a matter within the President's independent power must be implemented by treaty.

Senator ERVIN. Well, here is a power which is given to the President and the Senate jointly, to make treaties, and here is a provision of the Constitution that says that Congress shall have the power to enact any legislation necessary and proper to carry out any of the powers vested by this Constitution in the United States or any Department or officer thereof, and why was that not sufficient to give Congress the power to prescribe what kind of agreements will be made by treaty?

Mr. ERICKSON. Well, I do not think that the necessary and proper clause permits expanding the scope of a constitutional provision unless the provision itself contains that authorization.

Senator ERVIN. Would not defining the types of agreements to be made by treaty serve to contract, rather than expand, the scope of the constitutional provision?

Mr. ERICKSON. Well, it cannot alter it; let us put it that way.

Senator ERVIN. Well, Congress can pass laws to execute constitutional provisions.

Mr. ERICKSON. Oh, yes. It could.

Senator ERVIN. Why, since Congress undoubtedly has the power of the purse, would not Congress have the power to enact a statute saying that every agreement negotiated by the President with a foreign nation which involved the expenditure of the funds of the United States to implement it should be submitted in the form of a treaty?

Mr. ERICKSON. Well, I think that is using the Congress's appropriation power in a context which would be inconsistent with the treaty power. Certainly, the Congress can fail to appropriate funds that may eventually be necessary at a later date.

Senator ERVIN. Well, why would not Congress have a right to say that in advance instead—instead of waiting until the agreement is made?

Mr. ERICKSON. Well, if it is stated in advance, it may potentially interfere with the independent powers of the President to act within the sphere that is committed to the Executive.

Senator ERVIN. Well, does the Constitution give the President the power to obligate the expenditure of Federal funds?

Mr. ERICKSON. It does not.

Senator ERVIN. But it gives him the power, you say, to make an agreement which involves the expenditure of Federal funds without the consent of Congress, and that the Congress has no power under the Constitution to state in advance that it is not going to recognize the validity of such an agreement unless it is submitted to the Senate in the form of a treaty.

Mr. ERICKSON. Congress certainly is going to have the opportunity to act insofar as the appropriation is concerned. I think that is the important thing.

Senator ERVIN. Well, the Constitution certainly says that no funds will be expended out of the Federal Treasury except by an appropriation made by Congress.

Mr. ERICKSON. I agree with that.

Senator ERVIN. Why does that not give Congress the implied power to say by statute that it is not going to appropriate any funds under any agreement made by the President with a foreign country unless the President submits that agreement to the Senate in the form of a treaty, for the advice and consent of the Senate? It seems that the Congress has some implied powers as well as the President.

Mr. ERICKSON. Well, I think Congress could pass a statute like that, but I fully believe that that sort of a statute could not in any way interfere with the President's exercise of his independent powers as Commander-in-Chief or as Chief Executive.

Senator ERVIN. The Constitution also says that Congress shall make laws for the Government of the land and naval forces, does it not?

Mr. ERICKSON. Yes.

Senator ERVIN. And it provides it shall maintain an Army and a Navy.

Mr. ERICKSON. Yes.

Senator ERVIN. Do you contend that the President has any power as Commander-in-Chief to use the armed forces of the Nation without the consent of Congress except in defense of the United States or a State against invasion or threatened invasion?

Mr. ERICKSON. Well, certainly the President has the power that you express. The President certainly, as a minimum has the further power that once forces are committed to combat, to control the conduct of the military at that point as Commander-in-Chief.

Senator ERVIN. I certainly agree that after the forces have been constitutionally committed to combat, the President as Commander-in-Chief has the power to direct the tactics and overall strategy. But I do not believe that the President, for example, could send out troops to Patagonia to engage in helping Argentina, or whatever country owns Patagonia, to suppress an insurrection down there, without the consent of Congress, do you?

Mr. ERICKSON. I think we cannot look at that as an abstract principle.

Senator ERVIN. I think that is rather concrete.

Mr. ERICKSON. Well, your example is rather concrete but I think we have to flesh it out with more facts. There may very well be a function that the President is exercising in accordance with his power as Commander-in-Chief and the conduct of foreign affairs. I do not know what the circumstances are. If he was just sending them down there on a frolic that would be something quite different.

Senator ERVIN. To give you a hypothetical question, the people of Patagonia rebel against Argentina and the President on his own initiative orders the Army, Navy, Air Force to go down there to assist Argentine to suppress an insurrection. Do you think he has that power either as Commander-in-Chief or any power as Executive or any power in the international field?

Mr. ERICKSON. We certainly must have some interest or some national interest or reason for the dispatch of troops under those circumstances.

Senator ERVIN. What national interest could we have under that hypothetical state of facts, the power of President to do that?

Mr. ERICKSON. I am not aware of any.

Senator ERVIN. I am not either.

Now, I think we can probably agree that as far as executive agreements are concerned, there are three categories of them. One is the category where the power of the President has either express power, such as Commander-in-Chief, or implied power such as in receiving ambassadors to make executive agreements without the consent of Congress or the substantive approval of Congress. Is that not correct?

Mr. ERICKSON. Yes.

Senator ERVIN. Then there is a second category which does not cause me any concern. That is where the President makes an executive agreement for the purpose of carrying out powers vested in him by an act of Congress or a prior treaty.

Mr. ERICKSON. Yes.

Senator ERVIN. Then we have a third category as I see it where the President negotiates an executive agreement which requires Congress substantively to exercise some of its constitutional powers in order to implement it. For example, where he makes an executive agreement to give financial aid to another country out of the U.S. Treasury. Are not those roughly speaking, three categories in which executive agreements can be made?

Mr. ERICKSON. I think your statement is accurate. It follows the practice of the State Department in their existing circular.

Senator ERVIN. Yes. I think it is in harmony with their circular on the subject—the regulations in circular 175.

Mr. ERICKSON. That is right. The only area of uncertainty—

Senator ERVIN. Now—

Mr. ERICKSON. Excuse me.

Senator ERVIN. Now, is it your position that Congress is totally incapable under the Constitution of enacting any legislation in respect to this third category of agreements prior to the time the President negotiates them?

Mr. ERICKSON. Well, it is my position that any legislation Congress may undertake in that area cannot limit or restrict the President in the exercise of his independent powers. That is the limitation that I would place on that.

Senator ERVIN. But the only independent power that you maintain the President has in this connection, as I construe your testimony, is that he has the power to negotiate. He does not have the power to compel the Congress to appropriate money, for example.

Mr. ERICKSON. That is right.

Senator ERVIN. So why should not Congress have the power, in a field of that kind, to require the filing with the Congress of the executive agreement and declare that it can be invalidated at least by a joint act of the two houses?

Mr. ERICKSON. Well, again, Mr. Chairman, this agreement we are referring to could very well involve the various independent powers of the President. I think we have to take the agreements we are talking about in context.

Senator ERVIN. I believe we have to concede that the agreement cannot be implemented without action on the part of Congress, and the President has no independent power to obligate Congress to appropriate the money that is required to carry out the agreements.

Mr. ERICKSON. Perhaps I misunderstood the category we are talking about.

Senator ERVIN. I am talking about the third category. That is where the President negotiates an executive agreement which cannot possibly be implemented without the subsequent action of Congress. Now, why should not the Congress have the power to pass legislation which would say that the President shall file that agreement with Congress and Congress shall have the power within 60 days to invalidate it by concurrent resolution of both Houses of Congress.

Mr. ERICKSON. Well, I think in that category it could be the case. But are we not going through an exercise there which may be unnecessary? In other words, if it is the type of agreement whereby it would require subsequent congressional action, Congress would have the opportunity to reject it anyhow. I would quarrel with the idea of having a preexisting statute which would or could create confusion as to what agreements fall within this category.

Senator ERVIN. There is nothing in the Constitution that would require the Congress, in respect to an agreement of that kind, to just wait for an indefinite time and just refuse to act at all is there?

Mr. ERICKSON. No, there is not.

Senator ERVIN. Why would it not be in the interests of orderly government to have the Congress act immediately, instead of waiting until an appropriation is sought to carry out the agreement?

Mr. ERICKSON. Certainly, we would have to expect that Congress would, if they are going to act, act with dispatch on a particular matter that is submitted. I believe what you are suggesting is that under some circumstances it may be a rather routine or automatic way of gaining the congressional approval that might be required under the executive agreement. I think in that limited circumstance it does offer a preestablished procedure. But I think those cases would be extremely limited and I would offer that the Congress would certainly have the same opportunity, without the overlay of this general legislation that we are talking about, to accomplish the same thing.

Senator ERVIN. From the executive standpoint, there would be the advantage of having required, only a majority vote of each House instead of having the treaty made which would require two-thirds of the Senate.

Mr. ERICKSON. Well, I am assuming now we have an executive agreement which requires congressional implementation in some fashion and the normal legislative process would apply.

Senator ERVIN. I think that a lot of the friction between the executive and the legislative branches of the Government arises out of the fact that Presidents now, regardless of what party they belong to, have a very strong tendency to make executive agreements which require subsequent action on the part of Congress under our Constitutional system of Government without ever submitting them to the Senate for ratification as a treaty. It puts the burden on the Congress to either repudiate the action of the Executive, or to quietly acquiesce, and I think it causes a great deal of dissatisfaction in the Congress because the Congress hates to be put in the position of having the President go out and make agreements with other nations which cannot be implemented without congressional action and then come to the Congress and say, well, this is a fact accomplished,

and you have got to just lie down and be good boys and carry out what I have agreed to. It seems to me, as a matter of practical politics, that the President would be well advised, regardless of any constitutional argument, to reduce to the form of the treaty and submit to the Senate for ratification any agreement which requires subsequent congressional action.

PROFESSOR KURLAND. First, if I may, I would like to clear Mr. Justice Jackson's name just a little. The 50 destroyers were delivered to England pursuant to a statutory authorization of Congress. When the naval authorities decided that these were no longer of use to the American forces the President was authorized to dispose of over-age destroyers. I think the language quoted from Mr. Justice Jackson's opinion when he was Attorney General relates to the acquisition of the right to acquire the bases rather than to the sale or disposal of the destroyers.

MR. ERICKSON. Well, certainly in the course of rendering the opinion reference was made to the statutory basis, too. I quoted the language that we did quote to establish what Attorney General Jackson thought the powers of the President were without the statute.

PROFESSOR KURLAND. It was only a point of personal order since I am engaged in writing the biography of Justice Jackson and I do not want the record to be blotted.

It seems, Mr. Erickson, that your argument proceeds on two bases. One is an argument by way of construction of the language of the Constitution and the other is an argument from history. I must say the argument by construction which has been advanced by other eminent authorities is one that troubles me a good deal.

If the grant of power in article 2 to the President to make a treaty is not an exclusive authorization, as you have suggested, that the treaty is only one form of international agreement, the problem occurs to me that there is no reason why the Congress of the United States could not enter into a legislative agreement with a foreign nation. Is that right?

MR. ERICKSON. I do not believe that we could, in the form of Government we have, have more than one principal organ for the implementation of or the conduct of foreign affairs.

PROFESSOR KURLAND. Well, that does not derive from the construction. If this treaty authority is not exclusive and unique, as you suggest, on the grounds that a treaty is only one form of agreement with a foreign nation, and the President gets his authority to engage in the making of agreements somewhere else, then quite clearly the legislature can also get its authority to make agreements somewhere else. Indeed, if you look to article 1 there are a lot more grants of authority on which to pin that cause than you can find in article 2.

MR. ERICKSON. You certainly have a number of express subjects over which the Congress may legislate.

MR. KURLAND. I am suggesting that GATT might better have been negotiated by Congress than by the Executive. If this form of construction, this notion that treaty is not meant to indicate the President shall have the power to deal with—to negotiate agreements with foreign governments as treaties is not exclusive, I have a great deal of difficulty in seeing why the negotiating with foreign

governments is an exclusive power at all. I think that perhaps history speaks to the proposition on that score but I do not think the construction of the constitutional language does this.

Mr. ERICKSON. Well, I think it certainly is the combination of the history and recognized constitutional position of the Executive dealing with foreign affairs. And I think the practicalities would support this.

Professor KURLAND. That goes outside of the language.

Mr. ERICKSON. Yes; I agree with that. Also it is necessary to operate our Government from day-to-day, I believe.

Professor KURLAND. The arguments from history also give me some trouble. I would agree with your proposition on page 4 that in some ways the best evidence of the Framers' intention lies in the usage in early days of the Republic.

The question I have is in the early days of the Republic, were there executive agreements negotiated with foreign countries which were not subject to Senatorial approval and which did not have legislative sanction in advance? That is, is not the Post Office Act typical of the early executive agreement, that is, an authorization by Congress to enter into an agreement with foreign authorities?

Mr. ERICKSON. I think that is a fair statement.

Professor KURLAND. So that we do not have in the early history executive agreements which fall within either the treatymaking power but are subject to Senate approval, or within the prior authorization of Congress?

Mr. ERICKSON. At that point in time, I am drawing the distinction between the treaty and an executive agreement which in most cases as you point out, has been founded upon some other authorization.

Professor KURLAND. So it is not either the early history or, to my mind, the language of the Constitution that authorizes executive agreements but really fairly contemporary history.

Mr. ERICKSON. Well, I would not be prepared to say that that is completely the case. I cannot recite you chapter and verse of any early agreements that have had only the Constitution for basis or authority.

Professor KURLAND. I think you might find some, just as to location of American Embassies in foreign capitals, et cetera, which did not have specific legislative authorization. But I think you will be hard put to find any, to use the term that you and the chairman have trouble with, substantive content which lacks the authority either of the Senate or the Congress.

I come back to the proposition, then, that what we have to rely on is practice of recent vintage, comparatively recent vintage, rather than the original meaning of the Constitution or construction of the constitutional language itself.

That brings us back to the problem we have in this committee over and over again. Do errors, if sufficiently often repeated, create a constitutional convention that cannot be changed by legislative action? I really do not expect an answer to that.

Mr. ERICKSON. Well, I will offer a comment, if I may, and that is that I think the use of the executive agreement certainly is not

something that has come upon us in the last several years. It has been with us for some time. I would not paint that picture quite the same way as I think you would.

I also believe that the times have changed. The changes in the world, the time factors and the frame within which the Executive must operate, have made the powers of the President as the Chief Executive, as Commander-in-Chief, and in the area of foreign relations such that there is more need for this sort of activity now than might have been in the early days of our Republic.

Professor KURLAND. You are not saying the Constitution has become obsolete.

Mr. ERICKSON. No. I am not saying the Constitution has become obsolete. I am saying the Constitution is a magnificent document in that regard. It fits the times.

Professor KURLAND. Thank you, Mr. Erickson.

Mr. EDMISTEN. Mr. Erickson, you are not attempting to say to the subcommittee that S. 3475 is an attempt to do away with executive agreements, are you?

Mr. ERICKSON. No.

Mr. EDMISTEN. That seemed to be the tenor of your statement.

Mr. ERICKSON. No. I did not intend that at all.

Mr. EDMISTEN. In the second category that Senator Ervin mentioned, where an executive agreement is negotiated and concluded pursuant to legislation, do you see anything wrong with the Congress being able to look at the agreement to see if the executive branch has exceeded the bounds of its authority in that legislative grant of authority? Why should it not be able to look at the executive agreement and see if the executive branch has followed its dictates and to see if it has deviated from the dictates of Congress. No, if there has been a deviation, why should Congress not be able to say that the agreement cannot be concluded?

Mr. ERICKSON. I think that it would be legal for Congress as a matter of domestic law, to pass legislation overriding such an agreement.

Mr. EDMISTEN. Then there is really no objection to the bill in that regard. The Congress says to the Executive, you submit the executive agreement, we will look at it, and if you have substantially deviated from what the Congress authorized you to do, then you may not conclude that executive agreement.

Mr. ERICKSON. No. I certainly would not go that far. I think there again we have the question of whether or not that agreement is going to be within, or have as a subject, a matter within the President's independent powers.

Mr. EDMISTEN. Well, I do not see where that comes into play. If the President is acting pursuant to a congressional grant of power, I do not believe his independent powers come into play there. He is supposed to follow the statute. And the question is, has he gone beyond the scope of his authority?

Mr. ERICKSON. If you wish to assume in your question that we are not talking about any independent power of the President—

Mr. EDMISTEN. Yes.

Mr. ERICKSON (continuing). That, of course, makes it much different.

Mr. EDMISTEN. Then actually, this bill of Senator Ervin's is a rather mild and gentle bill, is it not? It is not going to disrupt things to a great extent as far as the executive branch is concerned.

Mr. ERICKSON. Oh, I think it could very well disrupt in the sense that it is all-encompassing. It purports to cover all international arrangements. As you are well aware, there is the 60-day waiting period and superimposed upon that is the question of whether or not the substance of the agreement is anything that requires action on behalf of the Congress in any event.

Mr. EDMISTEN. Well, at the present time, the only check that the Congress has on international agreements is if it is done through the treaty route or if it is done and then the Congress has a chance to say no, we will not appropriate money. Now, presently that is the only way that the Congress gets in on this, is it not?

Mr. ERICKSON. I think they are the two primary methods by which Congress would get in on it. As you know, the agreements are made available to the Congress.

Mr. EDMISTEN. So except for treaties, the only way that Congress gets in on the act is through reaction. It reacts to something that is a *fait accompli* already.

Mr. ERICKSON. Yes. I think that is a fair statement.

Mr. EDMISTEN. Now, I take it that the Justice Department agrees with the State Department that the Case bill is a wise piece of legislation and ought to be passed?

Mr. ERICKSON. Oh, I would not characterize it as a wise piece of legislation. I would say at this point in time that there is not active opposition to it. I think under section 112a of title 1 of the United States Code that you get a great deal of information that you would get under the Case bill (S. 596, 92 Cong.).

Mr. EDMISTEN. I can tell you what that information is. It is in the form of a pamphlet called *Treaties and Other International Agreements*, and there are about two lines for every agreement which does not in any way tell you what it is.

Mr. ERICKSON. Well, I have gone over this with State and their position is, and I am surprised that Mr. Stevenson did not take issue with that if he were asked the same question, because they feel that they supply rather complete information, including the full text of the agreements as they are concluded. I am speaking from what I am told transpires in the State Department. I have no personal knowledge on this subject.

Mr. EDMISTEN. Yes. Thank you.

Senator ERVIN. In my reading of the State Department regulations on this subject, I am compelled to conclude that these regulations in effect say that the ultimate effect is that whether an agreement, an international agreement, should be made in the form of a treaty or executive agreement is something which is left entirely to the whim of the President. I say this for this reason. Section 721, entitled "Exercise of the Treaty-Making Power," provides "treaties are designed to promote United States interests by securing action by foreign governments advantageous to the United States."

Then section 722 headed "Exercise of Executive Agreement Making Power," reads as follows:

Executive agreements are not used when the subject matter is of such a nature that it should be covered by a treaty. The Executive agreement form is used only for agreements which fall into one or more of the following categories: (a) Agreements which are made pursuant to or in accordance with existing legislation or treaty. (b) Agreements which are made subject to congressional approval or implementation. Or (c) agreements which are made under and in accordance with the President's constitutional power.

Now, is it not reasonable to construe section 722 to say that the President has authority to make executive agreements in respect to every kind of an agreement that the United States could possibly make with another nation? I cannot think of any agreement that does not fall within (a), (b), or (c) of section 722.

MR. ERICKSON. Well, I think that is accurate. But I do think that (a) and (b) preserve the congressional prerogatives, if you will. I do not think it is an intent to exclude any involvement on behalf of the Congress.

Senator ERVIN. But this regulation would authorize, if it is valid, the President to refrain under all circumstances from ever submitting a treaty to the Senate for ratification or rejection, would it not?

MR. ERICKSON. Oh, no. I do not read it that way.

Senator ERVIN. Can you tell me any kind of an agreement which the United States could conceivably make with any foreign country that does not fall within categories (a), (b), or (c)?

MR. ERICKSON. Well, I think we have to look at the first sentence of section 722 which says executive agreements are not used when the subject matter is of such a nature that it should be covered by a treaty.

Senator ERVIN. Well, that begs the question because that does not tell us when it should be made a treaty. That is the point I am making. I have searched my very finite mind to see if I could conceive of any possible agreement the United States could ever make with a foreign country that does not fall within categories (a), (b), or (c) of section 722 of the State Department regulations, and I can find none.

MR. ERICKSON. Well, I think we could have an agreement, for instance, with a foreign nation which is not made pursuant to existing legislation.

Senator ERVIN. Yes, but——

MR. ERICKSON. And we could have one which is not made subject to congressional approval. I think this is just relating to——

Senator ERVIN. But can you conceive of any agreement which is not made pursuant to or in accordance with existing legislation or treaty which does not fall within the classification of (b) or (c)? I think the three are all-inclusive when you add them together. In other words, I think the State Department says that the President has the power to bypass the treaty-making power altogether.

MR. ERICKSON. No. Mr. Chairman, I do not read it that way at all. I think the first sentence preserves the treaty power. There is no attempt to override that.

Senator ERVIN. What does the first sentence say that sheds any light as to what should be covered by treaty?

MR. ERICKSON. The light that it sheds is an acknowledgement that the types of executive agreements enumerated are to be distinguished from treaties. I think that is the light shed.

Senator ERVIN. The point I am making is that these things that can be done by executive agreement under (a), (b), or (c) are all-inclusive and included within their purview in every conceivable agreement of any nature which could be made by the United States with any nation. So I think this is sort of like the road sign where the road forks which says here you can bypass. These State Department regulations seem to say that you can bypass the treaty-making provisions of the Constitution entirely.

Mr. ERICKSON. Well, as I pointed out before, we really do not have any definition of what was encompassed by treaties. We have searched long and hard for a definition of treaties but I would submit, Mr. Chairman, that 722, and I am quite sure the State Department would agree on this, that 722 is in no way intended to be all-inclusive and encompass all matters that might be covered by treaty.

Senator ERVIN. But 722 says the treaty should be used but it does not say when an agreement should be made by treaty. It expressly says that almost every type of agreement conceivable should be made by executive agreement which makes the confusion more compounded than the confusion was before.

Mr. ERICKSON. Mr. Chairman, the State Department has—I am treading on, I guess, their ground—has policy guidelines which purport to specify factors that will be taken into consideration in determining whether or not a matter is to be concluded by treaty or executive agreement. I am a little reluctant to discuss those guidelines further because I understand they are in the process of revision at this point in time. But State certainly is aware of the question of trying to spell out for the guidance of everyone as to what should be accomplished by treaty or that should be accomplished by executive agreement.

Senator ERVIN. Section 722 says that treaties are designed to promote the U.S. interests by securing action from foreign governments. I wonder if that means that executive agreements might be used even if they are not advantageous to the United States. However, you did not write section 722, nor did I, but it is a very intriguing question. I hope for clarification. Revised regulations would enable us to give some definition to this as near as we can.

Thank you very much. You have given a most intriguing and illuminating statement.

Mr. ERICKSON. Thank you very much, Mr. Chairman.

BIOGRAPHICAL INFORMATION—RALPH E. ERICKSON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Lawyer; born Jamestown, New York, October, 3, 1928. B.S. 1952, Cornell University; J.D. 1955, Harvard Law School.

Admitted to California Bar, 1956; private practice of law as partner in Musick, Peeler & Garrett, Los Angeles California, 1955–1971; Director, Office of Community Goals and Standards, Department of Housing and Urban Development, June 1971–October 1971; Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, October 1971–January 1972; Appointed Assistant Attorney General, Office of Legal Counsel, January 11, 1972.

Professional Associations, Member: State Bar of California, 1956; American Bar Association, 1956; Los Angeles County Bar Association, 1956; American Arbitration Association, 1960; Council, Administrative Conference of the United States, 1972.

Non-professional Associations: Director, Harvard Law School Legislative Research Bureau, 1954-1955; Harvard Law School Association of Southern California, 1955; Founding trustee of Gruen Foundation for Environmental Planning, 1968-1971; and Cornell University Secondary Schools Committee, 1968.

Mr. EDMISTEN. Mr. Chairman, we are honored to have J. Fred Buzhardt, General Counsel on the Department of Defense, who has been with us before.

Senator ERVIN. I want to welcome you to the subcommittee and thank you for your willingness to appear and give us the benefit of your views on this very important subject.

**STATEMENT OF HON. J. FRED BUZHARDT, GENERAL COUNSEL,
DEPARTMENT OF DEFENSE**

Mr. BUZHARDT. Thank you, Mr. Chairman, I appreciate this opportunity to appear before you in connection with your hearing on executive agreements.

Mr. Erickson and Mr. Stevenson have earlier discussed with the subcommittee the relationships and distinctions between treaties and executive agreements. The subcommittee has specifically inquired for Department of Defense views with respect to those executive agreements in which the Department of Defense has an interest.

Before I turn to the executive agreements let me state the obvious—that treaties as well as executive agreements are often of particular interest to the Department of Defense. In fact, the major international agreements of interest to the Department of Defense have been concluded in the form of treaties, such as, for example, the Defense treaties, arms control treaties, treaties dealing with the laws of war (such as the Hague conventions of 1907, the Geneva Protocol of 1925, and the Geneva convention of 1949), treaties dealing with the law of the sea, outer space treaties, international telecommunications treaties, the Panama Canal treaty, the Guantanamo Base treaty, the Okinawa Reversion treaty, and the United Nations Charter itself.

The comments which follow are directed solely to those executive agreements which are of interest to the Department of Defense. Executive agreements are deemed to be of interest to the Department of Defense if they have an effect, or a potential effect, on the operations and activities of the Department of Defense outside the United States or if they have an effect, or potential effect, on the relationship of the Department of Defense with foreign military personnel within the United States.

For the purposes of S. 3475, the term "executive agreement" is defined by section 2 of the bill as meaning:

Any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States, and which is made by the President or any officer, employee or representative of the Executive Branch of the United States Government.

As so defined, a large number of agreements of interest to the Department of Defense are entered into annually. As defined for other contexts, however—such as the Department of State's implementation of the requirement of 1 U.S.C. 112(a) for an annual compilation of "United States treaties and other international agree-

ments" and of the requirement of article 102 of the United Nations Charter that "every treaty and every international agreement" be registered with the Secretariat and published by it, or the proposed requirement of the Case bill, S. 596—the number of agreements not in the form of treaties which are of interest to the Department of Defense is far smaller.

This seeming paradox results from the international law and municipal law definitions of a "treaty"; in part, it is also dependent upon the subject matter of the particular agreement and of the law governing its implementation. Since this definitional problem materially bears on the scope of the bill's application, I think it important to address it at the outset in further detail.

From the international law point of view, international agreements are generically referred to as treaties. For this purpose, a treaty is: (1) an agreement (2) concluded between subjects of international law (3) which is governed by public international law. It may be either written or oral; it may be embodied in a single document or into two or more related documents; it may have a variety of titles, such as treaty, convention, protocol, declaration, agreement, covenant, statute, charter, exchange of notes, et cetera: and it may be signed by anyone (including non-diplomatic personnel) who has been authorized to do so and to bind his State.

Since the underlying purpose of a treaty is to manifest an intent to create, change or define relationships under public international law, an agreement between States which is intended to be governed by the Domestic law of one of the States is a contract rather than a treaty.

Further, if the manifest intent of the document is not to create legal obligations and rights, the document is not an agreement and hence, not a treaty. For example, depending upon the intent of the parties, an "Exchange of Views" may or may not be a treaty. Similarly, an understanding intended by two States to affect their relations but not to be binding legally is sometimes called a "gentlemen's agreement" but is not a treaty as defined above. Like a treaty, such as exchange of views or gentlemen's understanding could also be entered into either at the diplomatic level (including heads of state) or some other level.

From the domestic law point of view, a treaty in the international law sense may be entered into by the United States in only two ways: (1) by a treaty which is ratified in accordance with the provisions of article II, section 2, of the Constitution, or (2) by an executive agreement entered into pursuant to either a treaty, an act of Congress, the President's constitutional authority, or some combination of the above.

It should also be noted that the Congressional authorization for an executive agreement could take the form either of a statute which grants prior authorization to conclude the agreement or a statute which approves the agreement after it has been concluded. Section 33 of the Arms Control and Disarmament Act, as amended, is an example of the latter kind of congressional authorization; it provides that international agreements which obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of

the United States may be undertaken only pursuant to the treaty-making power of the President under the Constitution or as authorized by further affirmative legislation by the Congress of the United States.

From the domestic law point of view, there is no constitutional or statutory requirement that a treaty or executive agreement be executed in a particular format. And as is the case under international law, a treaty or executive agreement under United States law may be executed either in a single document or two or more related documents and may have a variety of titles. As a matter of custom, however, agreements entered into in the form of treaties are usually done in more formal formats however, executive agreements may be equally formal; see for example, "Defense Areas in the Federation of the West Indies" agreement, Feb. 10, 1961, TIAS 4734; the various Postal Conventions, such as TIAS 6354. Similarly, there is no constitutional or statutory limitation, with one exception, as to who is authorized to sign a treaty or executive agreement. By statute, postal "treaties or conventions" are the responsibility of the Postmaster General, 39 U.S.C. 407. As a matter of custom, however, treaties are normally but not always signed only by diplomatic personnel.

I should emphasize at this point that the Department of Defense and the military departments do not sign executive agreements committing the United States Government unless the commitment is either one which is wholly within the authority vested in the Department of Defense and can be implemented by the Department of Defense alone or, if implementation is required on the part of other government departments or agencies, only where any such commitment has been cleared with the other departments or agencies concerned and is equally within their authority to implement.

As I have pointed out earlier, the critical point is not the level of signature but whether the document is both intended to bind the governments concerned and to be governed by public international law. That intent is ordinarily manifested in defense or service-to-service level agreements by express references in the text of the documents to the rights and obligations of the governments. In some cases, even where the defense or service-to-service level agreement does not expressly refer to the governments concerned but only to the respective defense agencies, the intent of the parties nevertheless to bind the governments may be manifest from the fact that the particular agreement was entered into pursuant to the express provisions of an "umbrella" agreement which does not refer to the governments and which authorizes implementing technical arrangements to be entered into by the defense agencies. If the document or documents concerned constitute a treaty in the international law sense, the agreement under domestic law can only be a treaty or executive agreement. It is only if the "agreement" is not a treaty in the international law sense but is nevertheless legally binding—i.e., it is governed by the domestic law of one of the parties or deals with a subject matter more akin to a commercial contract between private parties—that it can also be said to be other than a treaty or executive agreement from the domestic law point of view.

To illustrate: Our co-production agreements and Navy ship leases with foreign governments are signed at the Defense level and speak expressly in terms of the rights and obligations of the governments involved; they are, therefore, treaties in the international law sense and executive agreements under U.S. law. In contrast, our Foreign Military Sales (FMS) credit agreements, which also expressly refer to the rights and obligations of the governments concerned, provide that the agreements (and the promissory notes issued pursuant thereto) shall be deemed to be contracts under the law of a specific State of the United States; hence, while legally binding contracts between the two governments, they are not treaties in the international law sense and are not treaties or executive agreements under U.S. domestic law.

As we read S. 3475, however, it is susceptible of an interpretation that all of these commitments would be subject to the requirements of the bill.

As I have previously noted, executive agreements of interest to the Department of Defense, whether concluded on the diplomatic level or on the agency level, are entered into either:

- (1) In implementation and under authority of a treaty;
- (2) Pursuant to statute;
- (3) Pursuant to the President's Constitutional authority; or
- (4) Some combination of the above.

Examples of executive agreements authorized by treaty are the bilateral status of forces agreements with Japan, Korea, and China, which implement the bilateral defense treaties with those countries. The multilateral Supplemental status of forces agreement with Germany, and the various supplemental status of forces arrangements with other NATO countries, implement the NATO status of forces agreement, which is itself a treaty. Some of the provisions of these agreements are authorized by statute as well; for example, the claims provisions of which are specifically provided for in U.S.C. 2734(a).

Illustrative of executive agreements authorized by statute are the wide variety of executive agreements entered into under the aegis of the Foreign Assistance Act of 1961, as amended, and the Foreign Military Sales Act, as amended. Pursuant to those statutes, bilateral executive agreements have been entered into with over 40 countries setting forth in general terms the conditions under which military assistance will be provided. In implementation of these basic bilateral agreements a wide variety of subsidiary executive agreements have been concluded dealing with such matters as the return to the United States of grant aid material, tax relief, the interchange of patent rights and technical information, protection of classified information, financial support of our military assistance advisory group in country, off-shore procurement, and cost-sharing projects such as the facilities assistance, mutual weapons development, and weapons production programs. With respect to foreign military sales, credit agreements, coproduction agreements, and sales contracts are entered into in the form of executive agreements. Sales contracts alone number some 3300 annually.

In addition to this foregoing category of executive agreements entered into pursuant to general grants of authority by the Congress, a

large number of executive agreements are in implementation of specific congressional enactments. Thus, the executive agreements under which we acquire bases, facilities, and installations overseas, or the rights to use on a joint basis the bases of foreign countries, may in part be considered to be authorized by specific authorizations and appropriations contained in the annual Military Construction Authorization and Appropriation Acts. In part, depending upon the location of such overseas facilities, these executive agreements may also be deemed to have been entered into in implementation of bilateral or multilateral defense treaties and pursuant to the President's constitutional authority as Commander-in-Chief. Depending upon the circumstances of the case, the congressional authorization and appropriation for the necessary military construction might precede the actual negotiation and conclusion of the agreement. In other instances, the congressional action might come subsequent to the conclusion of the agreement and constitute the authority needed to implement the agreement. In such cases, it should be observed that the agreement itself does not commit the United States to any action, and there would be no breach of the agreement if the Congress failed to provide the necessary funds for if the Congress failed to provide the necessary funds for implementation.

Examples of executive agreements done under the President's constitutional authority, but which might also in part be authorized by treaty or statute, depending upon the circumstances, are those which deal with the command structure of high level joint military commands such as SACEUR, SACLANT, and NORAD. Arrangements for the implementation of alert measures in such commands would be another example of a combination of such authorizations. On the other hand, military armistice agreements and intelligence exchange agreements would be illustrations of the type of executive agreement which would fall solely under the President's constitutional authority as Commander-in-Chief. Military overflight agreements would be another example of executive agreements concluded solely under the President's constitutional authority.

In terms of categorization by subject matter, it may be estimated that at least 60 percent of the executive agreements of interest to DOD are in implementation of foreign aid legislation. The next largest category are those concerning our rights to construct, operate and maintain military facilities and installations overseas. The remainder fall into a miscellaneous category dealing with such matters as off-shore procurement, disposal of surplus property, tax relief, aviation, claims, patents, geodetic surveys, research and development, communications, et cetera.

In terms of categorization by nature of authority, the overwhelming bulk of all the executive agreements of interest to DOD are either authorized by treaty or by statute. Only a minute fraction could be said to have been entered into solely under the President's constitutional authority.

From the perspective of the foregoing observations, I will turn to the bill introduced by the chairman, S. 3475.

First, insofar as executive agreements of interest to the Department of Defense are concerned, I do not believe the bill would serve any useful purpose.

With respect to those executive agreements in which the Department of Defense has an interest, the Congress is already intimately involved in the overwhelming majority.

As I pointed out earlier, approximately 60 percent of the executive agreements in which the Department of Defense is interested are in implementation of foreign aid legislation. Insofar as grant military aid agreements are concerned, the primary effect of these agreements is to secure agreement from potential recipient nations to the conditions and limitations prescribed by the Congress in the Foreign Assistance Act and other legislation. The Congress is not only well aware of the content of such agreements, but is in fact the initiator, through statutes, of the substantive provisions in such agreements. The same is true with respect to foreign military sales. These programs are reviewed thoroughly by both the authorizing and appropriations committees of the Congress. For each of these agreements, there is specific statutory authority, which demonstrates a high degree of congressional control.

The next largest category of agreements in which the Department of Defense has an interest are those concerning our rights to construct, operate and maintain military facilities and installations overseas. From a practical standpoint, these agreements provide only an option to the U.S. Government, and the exercise of the options is dependent upon both authorizations and appropriations from the Congress. The military construction authorizations and appropriations are premised on detailed justifications, which insures that the Congress is intimately involved in the process of implementation of such agreements.

Another substantial category of agreements of interest to the Department of Defense are those relating to status of forces. In most instances, these agreements involve the detailed implementation of treaties. Congress monitors the status of forces agreements through the Status of Forces Subcommittee of the Committee on Armed Services of the Senate, which you, Mr. Chairman, also chair. At a minimum, annual hearings are held to receive the report from the Department of Defense required by Senate resolution.

These examples demonstrate, I believe, that insofar as this concerns executive agreements in which the Department of Defense is interested, the mechanism and procedures which now exist provide the means for effective congressional control over such executive agreements and the procedure proposed by S. 3475 would only add new procedures to those which exist. These new procedures, however, would exact, in my opinion, a high and unjustified price in the capability of the Executive to effectively negotiate agreements essential and desirable in the interest of the United States. The proposed delay in effective dates would constitute a severe impairment and, in some cases, would preclude the consummation of agreements which could otherwise be obtained to advance the interest of the United States.

To the extent that the bill would purport to deprive the President of the power to make executive agreements in implementation of those authorities vested in him by the Constitution, the bill would be in conflict with the Constitution and, of course, we all know that a statute must be in consonance with the Constitution. With respect to

those agreements which are authorized by statute or a treaty, a similar constitutional question is presented by a bill which would purport to impose procedures which would impair the President's ability to negotiate since the President under our constitutional pattern is the instrument of the nation for the conduct of international negotiations. In addition, the bill provides for the disapproval of an executive agreement, whatever the authority for its execution, by a concurrent resolution, which, of course, is not a law. Under the supremacy clause in Article VI of the Constitution, Congress has no authority by concurrent resolution to repeal or amend the laws of the United States or treaties made under the authority of the United States.

In short, Mr. Chairman, I believe that S. 3475 is unnecessary, and impractical, and it raises serious constitutional issues. It, therefore, should not be enacted in our opinion.

That concludes my statement.

Senator ERVIN. Now, do you agree with me that executive agreements can be divided into three classifications, the first classification being executive agreements which are made by the President in the exercise of exclusive constitutional powers given him, and the second class being those which are designed to implement a prior treaty or act of Congress, and the third class, those which necessarily require subsequent congressional action for their implementation?

Mr. BUZHARDT. Mr. Chairman, I believe in the last category you would have to include not only those which require subsequent legislation but those which have prior authorization by statute, or maybe that was the second category. Maybe I did not understand.

Senator ERVIN. That was the second. In other words, it seems to me there are three categories of agreements we can make with foreign countries.

Mr. BUZHARDT. Right.

Senator ERVIN. The first is where the President makes an agreement which constitutes an exercise of an exclusive power given him by the Constitution as is illustrated in the *Pink* and the *Belmont* cases.

Mr. BUZHARDT. Yes.

Senator ERVIN. The second is where the President makes an executive agreement for the purpose of carrying into effect a prior treaty or prior act of Congress. And the third is where the President makes an agreement which necessarily requires for its implementation subsequent congressional action. Those three, it seems to me, cover about any kind of agreement that can be made.

Mr. BUZHARDT. Yes. I think I divided them somewhat differently, into those that are authorized by treaty, those that are authorized by statute, those authorized by the—in which the President has independent constitutional authority or some combination of the three. I think that would cover all of them and I think that is a little narrower, a little more concise. I think the one—the real difference we may have is adding a category of where the President has—enters into an executive agreement which requires a subsequent authority of Congress. I find it hard to find out how that is a separate category because it still must be pursuant to a treaty, to a statute or in his constitutional authority.

Senator ERVIN. Well, I had in mind in that third category an executive agreement which would undertake to provide that the United States should give financial aid to a foreign country, or an executive agreement which would authorize the use of the Armed Forces of the United States in other than a defensive war.

Now, those two cannot become binding unless the Congress acts in the future.

Mr. BUZHARDT. Let me address them one at a time, Mr. Chairman. I think the first example you gave falls within the category of prior authorization by statute because we have the Foreign Assistance Act of 1961. In the absence of that, I am not sure the President could conclude an agreement that was binding—

Senator ERVIN. That is the point I am making.

Mr. BUZHARDT (continuing). Without an act of Congress to give aid to a foreign country. I do not think we could commit. I have serious questions about it.

Senator ERVIN. That is the point I am making. Of course, if the President were empowered by an independent provision of the Constitution that gave him exclusive authority to make a binding agreement, or if there were a prior treaty or a prior act of Congress which authorizes the President in substance to make an agreement, then he certainly would have the authority to negotiate such an agreement. But there are classes of executive agreement to be negotiated by the President which cannot be carried out by the President in the exercise of his own powers, but requires the exercise of powers of Congress for its implementation, and that, of course, is not a binding commitment on the United States unless Congress in effect by subsequent action, approves it.

Mr. BUZHARDT. That is correct, but even a treaty may require subsequent implementing legislation before it can be implemented by the President, hence your third category does not apply only to executive agreements.

Senator ERVIN. You have given us a very complete exposition of the different kinds of agreements and different kinds of treaties which affect the Defense Department, and point out, I think rightly, that the great majority of agreements we have with foreign countries which involve matters of major importance have been in the form of treaties.

Then you point out also that—I am surprised at the percentage—you say about 60 percent of the executive agreements which are made under the auspices of the Department of Defense are foreign aid commitments which—

Mr. BUZHARDT. Mr. Chairman, if I might say, I am talking about the ones the Department of Defense is interested in, that have an impact on the Department of Defense. That includes categories over and above those the Department of Defense official signs. Some of those are State Department. Many of the foreign aid agreements are actually signed by the State Department, not the Department of Defense. So this applies to those which we are interested in, not just to those we signed.

Senator ERVIN. Yes. I understand that, particularly with reference to the sales of arms to other nations, because the Department of Defense has peculiar interest in that.

Mr. BUZHARDT. And we do sign those, Mr. Chairman.

Senator ERVIN. Yes. Now, of course, most of our commitments by which we have stationed troops abroad have been in the form of agreements that have been pursuant to treaty obligations.

Mr. BUZHARDT. Yes.

Senator ERVIN. I would imagine that the Department of Defense or its subsidiaries necessarily have to make what you might call housekeeping agreements with foreign nations where our troops are stationed under treaty commitments.

Mr. BUZHARDT. Yes.

Senator ERVIN. I would assume these have all been authorized either by act of Congress or been authorized by treaties.

Now, is there any doubt in your mind that—even taking the first category of executive agreements—that Congress, while it cannot limit the President's power to make an agreement which is sanctioned by his independent powers under the Constitution, that Congress could pass a statute which would require the President to submit those agreements to Congress merely for the information of Congress?

Mr. BUZHARDT. No, Mr. Chairman. I do not have any question that Congress could pass such an act. We both know from our prior discussion, there is some possibility that a question of executive privilege might arise. It may arise on occasion where an Executive would think it not in the national interest to that extent and I would think even if this were done it would be——

Senator ERVIN. With respect to the second category of agreements, those which have been authorized by prior statute, or by prior treaty, is there any doubt in your mind that Congress has the right, the power, to adopt procedures which make it certain that the executive branch of the Government is carrying out those powers in a manner consistent with the intent of Congress?

Mr. BUZHARDT. I think there is a limitation there, that they do not interfere with the President's authority to negotiate. I also think there is an additional limitation which was brought to my mind at least by your discussion with Mr. Erickson. I question whether Congress could write procedures into statute which would be valid if they attempted to bind either that Congress or future acts by a subsequent Congress. It is conceivable to me that, for instance, under the bill you have introduced, if the Executive entered into an executive agreement to provide grant aid under the Foreign Assistance Act, which is a congressional authorization, and your bill was law; the agreement was submitted to the Congress; Congress passed a resolution of disapproval of the agreement; and then subsequently during the appropriations process the Congress nevertheless passed the appropriation, neither your bill nor the resolution of disapproval could keep the appropriation from being effective. The executive could spend the money as the Congress appropriated because the Congress could not bind itself by its prior act. Conversely, if the Congress passed a resolution of disapproval under your bill, it would not legally bind Congress to subsequently appropriate emobile implementation.

Senator ERVIN. I am not troubled by that point, but I think, that while Congress cannot tie its own hands, it can tie the President's hands to some extent.

Mr. BUZHARDT. I think it can tie the President's hands to the extent it does not interfere with his ability to negotiate.

Senator ERVIN. Yes. But I think that Congress has the power to determine whether the negotiation in which the President is engaged is consistent with the act of Congress which authorizes the negotiations.

Mr. BUZHARDT. Mr. Chairman, I would suggest that if the President executed an executive agreement to carry out a congressional act which in fact exceeded the authority of the congressional act, that to the extent it did exceed the congressional authority, it would be null and void and the place to so declare it would be in the courts, not in the body that authorized the legislation. It would be a matter of violation of law. The law you had passed would have no force and effect.

Senator ERVIN. How do you account for the General Accounting Office? It is not necessarily dealing with foreign affairs, but I would think that the General Accounting Office could determine whether an expenditure made by the President under a prior act of Congress was in harmony with the prior act of Congress.

Mr. BUZHARDT. I would agree that the General Accounting Office could make such a determination in the normal course of events as the Comptroller General's rulings would apply. I think as a matter of practice they are generally followed, but if you wanted to punish somebody, or recover the funds, then you would have to proceed in the courts.

Senator ERVIN. Of course, we have a controversy—among many of our controversies—between the legislative and executive branches, one about that very question. It is not in the defense field. It is not in the field of executive agreements with foreign countries. But Congress set up the General Accounting Office as an arm of the Congress, with authority under the statute to pass on the validity of Federal expenditures. We have often had disagreement between the General Accounting Office and the Justice Department in respect to rulings by the Comptroller General. I have introduced a bill to give, in those situations, the General Accounting Office authority to go into court to determine if its ruling is valid when the Department of Justice disagrees.

Mr. BUZHARDT. I am aware of that bill, Mr. Chairman. And I might say, if you will notice, as a matter of practice, the Department of Defense follows the General Accounting Office rulings.

Senator ERVIN. Considering again this question that Congress lacks the power to pass on the validity of an act which it has authorized, that is, whether the act has been carried out by the President. You are familiar, of course, with the procedure by which the President is given the power by Congress to reorganize the departments and agencies of the Federal Government.

Mr. BUZHARDT. Yes.

Senator ERVIN. The legislation contains a provision which gives the President power to reorganize, but all those acts contain a provision that either House of Congress may, within a limited time, veto the reorganization. Why would not a procedure like that, written into an act of Congress, give Congress the power to nullify action of

the President, which was previously authorized by Congress, by concurrent resolution? If either house can veto it, both houses certainly could veto it.

Mr. BUZHARDT. Mr. Chairman, I am not prepared to defend the constitutionality of the procedures under legislative reorganization acts. There has always been a question raised with respect to procedures which authorize one House or a committee of one House to exercise the powers of the Congress as a whole. And I think there are serious constitutional questions posed, although I do not anticipate as a practical matter, they will ever be litigated.

Senator ERVIN. Well, I do not quarrel with your views on that, because I have often doubted whether Congress can delegate that kind of broad scope of legislative authority to the President. That has been standard practice however, and I think that a very plausible case can be made for the proposition that when Congress grants power to the President, Congress can grant that power under the condition that it can be nullified by concurrent resolution or by a veto by either House. But, of course, we cannot settle that proposition here today. Congress ratified treaties which authorized the establishment of the status-of-forces agreements with other nations, but in ratifying those treaties, reserved the power to see how these agreements worked in actual operation.

Mr. BUZHARDT. That is true, Mr. Chairman. but there are practical problems with that approach. For example, as you know, there are joint committees, under the status-of-forces agreements which in some cases meet as often as once a week. They involve an enormous amount of day-to-day affairs and when a joint committee reaches agreement on how to settle one of these housekeeping operations, if you will, it is at least my position that the governments are bound and it would not be practical to make these agreements conditioned on congressional approval.

Now, as you well know from having been chairman for many years of this subcommittee, there is a reporting requirement in the Senate resolution which the Department of Defense maintains and it has always been in the form of a hearing.

Senator ERVIN. I think Congress has plenary power not only to enact legislation within the purview of the Constitution but also power to determine whether that legislation is being properly implemented by the only branch of the Government which can execute congressional acts, and that is the executive branch.

Mr. BUZHARDT. Mr. Chairman, I would agree with you that the Congress has the power to pass judgment on whether the Executive is following an act of the Congress and indeed implementation justifies the original enactment. I would seriously question whether Congress has the power to give the President an authority and a responsibility in which he is the exclusive executing instrument and then itself to become a part of the execution of its own laws to the extent that they themselves would make the agreement conditional on their subsequent actions to the extent it even was within the law, and if you made it conditional at all, you would have to make it conditional in total. This would be an invitation for the Executive to have to negotiate with Congress or to permit Congress to participate in the negotiations to make sure you could get one that was binding.

Senator ERVIN. I think Congress can pass an act authorizing the President to negotiate agreements, and it can provide that the agreements not become binding unless they are reported to Congress and meet certain conditions. I think that is illustrated by one of the statutes you cited on page 5, of your statement, I refer to section 33 of the Arms Control and Disarmament Act as amended.

Mr. BUZHARDT. The arms control agreement does require that the Congress would have to approve with subsequent legislation this particular type of agreement. Certainly if you construe the agreements which the Executive reaches in this field as one requiring congressional authority, which I would be inclined to say it takes, I think that that is unquestionably constitutionally valid.

Senator ERVIN. Well, if that is so, why doesn't Congress have the constitutional power to provide that when it grants any power to the President to negotiate, that it can require the President to report how he exercises that grant, and require that it shall be subject to congressional approval? That is all this bill requires, as I construe it, in respect to agreements which are authorized by prior treaty or prior act of Congress.

Mr. BUZHARDT. Well, with respect to a prior treaty, when you ratify I do not believe you can subsequently limit. With respect to a statute—

Senator ERVIN. Well, they do exactly that in section 33 of the Arms Control and Disarmament Act.

Mr. BUZHARDT. That wasn't a treaty, Mr. Chairman.

Senator ERVIN. I know.

Mr. BUZHARDT. I say where you ratify a treaty, unless your express reservations at the time, you cannot subsequently pass an act which would then limit the international effectiveness of that treaty and make it contingent on new conditions which the Congress imposed. That would breach the treaty.

Senator ERVIN. I suppose Congress can repeal it.

Mr. BUZHARDT. Congress can nullify the domestic effect of the treaty by a later inconsistent statute.

Senator ERVIN. Now, section 33 of the Arms Control and Disarmament Act I think is very correctly summarized on page 5 of your statement and it provides that the President can make international agreements which obligate the United States to disarm, or reduce, or limit the Armed Forces or arms levels of the United States, but it provides that these agreements shall not become binding unless they are authorized by affirmative legislation on the part of Congress or by subsequent treaty. That being true, I don't see why Congress doesn't have the constitutional power to pass a general statute and make it applicable to future legislation unless Congress repeals it or amends it, which delegates to the President power to make agreements, subject to the reservation that they must be submitted to Congress for inspection, and that they must be approved by Congress.

Mr. BUZHARDT. I think where you are dealing with a statute where the President must have a statute, to exercise negotiations, in other words, the subject of the negotiations is conditioned on congressionally provided authority, the Congress could impose limitations in that instance, particularly when the agreement requires

actions by the Government to be performed. Within the United States itself—actions which may be inconsistent with existing statutes. An arms control agreement is an example. The foreign aid program is an example of another kind. There are conditions of all descriptions laid down in the Foreign Assistance Act as you are fully aware. In fact, in most instances the agreements primarily consist of the conditions which Congress imposes. In addition, they are required to be reported.

Now, if we have an agreement providing aid, there has to be included in that agreement the terms and conditions of ultimate disposal of that grant aid and I think for the last 2 years we have had statutory requirements that those be reported to the Congress.

So, where the President's authority to negotiate on a subject matter is derived exclusively from a congressional enactment or a statute, I think the terms and conditions imposed are constitutionally valid.

I think there may be one small qualification, that if Congress tells the President to execute something, they cannot then put conditions on, which from a practical standpoint would make it impossible to do what he has been directed to do. And I think there is some limitation in that. They can't tell him to execute agreements because—they can't tell him or so circumscribe his procedures for negotiation that he can't actually negotiate because he does have the authority in the Constitution I believe to be the sole negotiator.

Senator ERVIN. I think he has authority to negotiate but I think when he negotiates outside of a very limited number of areas, that the President in effect is negotiating agent for the United States and that Congress has the power to prescribe the conditions, and that his negotiation is not to be binding without subsequent approval of Congress just as in the Arms Control Act. Where the executive agreement necessitates the subsequent exercise of congressional power, I think Congress has a right to limit that in the future instead of waiting and just refuse to exercise its powers subsequently.

Mr. BUZHARDT. Mr. Chairman, I think we would disagree to some extent here. If they tried to institute, the Congress tried to institute the prior agreement for their general appropriations authority, I think you would run into a question of whether you limit the Congress of the future.

Secondly, I believe it would be a most impractical approach for the simple reason that when you require a waiting period, you do impair the Executive's capability to execute an agreement. In some cases, not a large number, but you can never anticipate in advance, in some cases the ability to arrive at a final agreement at a particular time, as we are all aware, so that events can coincide, what the other side is to do and our Government is to do, is critical to the executive agreement itself, unless you can arrive at a date certain, and sometimes it must be an immediate date certain. The agreement cannot be consummated.

Senator ERVIN. I would think those would be very rare cases.

Mr. BUZHARDT. I can think of a few that I wouldn't care to name but I have participated in some or at least worked in connection with some where that was certainly the case.

Senator ERVIN. But I have no doubt of the power of Congress in respect to the third category of agreements where Congress has to act subsequently to confirm them, and I think a statute of this kind would produce smoothness in Government operations rather than the contrary. When the President makes an agreement which cannot be carried out without the subsequent action of Congress, there is going to be a time delay there automatically, until Congress enacts the legislation.

Mr. BUZHARDT. That is true. In those cases, and the best example I know is where we negotiate for base rights in a country where it is not under a treaty, through an executive agreement, all we really get from that is an option to use facilities of a foreign government. Sometimes ports and harbors. Real estate. But I think there would be really no purpose in Congress wanting to have a separate consideration of those other than having increase in workloads because nothing can be done without further authorizations and appropriations.

Senator ERVIN. No; but when an agreement is made without it being expressly stated that the agreement is subject to disapproval, or approval as the Congress might see fit, the President puts the Congress in a rather embarrassing position. As I told Mr. Stevenson yesterday, it is much like a man's wife going out and buying some clothes without his consent. It puts the Congress in the position of the husband who has to tell the tradesman that he is not going to pay for the clothes that his wife bought.

Mr. BUZHARDT. Mr. Chairman, I can't think off hand of any agreements that fall into that category because as I say, our base agreements are options for our advantage. They are options. They are clearly dependent on congressional authorization and appropriations. There would be no embarrassment and no breach of arrangements if Congress chooses not to provide the funds or the authorization to use them.

Senator ERVIN. But the trouble is that the President says I have already made this commitment.

Mr. BUZHARDT. Well, if it is a commitment then it is more than—

Senator ERVIN. If Congress doesn't go along with the President's action, then the Congress is put in a fix where it has to embarrass the President and the country by refusing to carry it out. That is what I am trying to avoid.

Mr. BUZHARDT. I understand it, Mr. Chairman, although I find it hard to find a specific case where those circumstances would exist.

Senator ERVIN. I can imagine a great many where they exist. For example, a few years ago the President went down to South America and made a speech and told them how much money he was going to give them in the Alliance for Progress and Congress refused to authorize it.

Mr. BUZHARDT. He just didn't sign an executive agreement. He just made a promise in a speech.

Senator ERVIN. About the same thing. If he has written out a piece of paper—I think it was written out in the speech.

Mr. BUZHARDT. It is written out in the speech. I recall the speech.

Senator ERVIN. He said we are going to give it to you. The practi-

cal effect of the speech is the same as if he had signed his name to it and made an agreement. I see little difference.

Mr. BUZHARDT. There would have had to have been a consideration, of course, for the agreement, I think. I think there was—I think it would have had to have been conditioned on subject to congressional action. I do not think there would have been any embarrassment, in fact, I don't think there was, the fact that it wasn't.

Senator ERVIN. I think it was sort of embarrassing to our relations with those countries. Here is a man who they think is the boss, who goes to their country and makes several promises, and then Congress subsequently has to repudiate the promises. So I think it would be better to have this bill which would prevent such embarrassments. Except in the cases where the executive has to report it to the committee, the Congress has no way to know what the executive branch of the Government is doing in this field.

Mr. BUZHARDT. Mr. Chairman, I might note that if you are going to take care of the situation you just described to me, you had better increase this definition in here to include speeches of the President.

Senator ERVIN. Yes.

Mr. BUZHARDT. Because I am not quite sure that the Congress then could constitutionally move because to require the President to have his speeches approved by the Congress, I think would be going a bit far. I don't think that is a problem that can be controlled by the legislative process, what the Executive says in his speech.

Senator ERVIN. No. Certainly, the President has freedom of speech under the First Amendment and we can't keep him from speaking, but we can keep him from carrying out his speeches or his executive agreements where they require subsequent Congressional action.

Mr. BUZHARDT. Really the point I am making, Mr. Chairman, is I can't think of an instance where we have had actually an executive agreement which attempted to commit the Government and which was not conditioned on subsequent Congressional approval. So I understand it could not be implemented.

Senator ERVIN. Why would Congress not have authority under the Constitution to provide that any agreement made by the President without its consent, which required subsequent Congressional implementation, should be placed in the form of a treaty and submitted to the Senate for ratification?

Mr. BUZHARDT. I think, Mr. Chairman, you have a very different proposition when you require the President to submit an agreement to the Congress in some cases for approval as legislation or treaty than if you specified that it must be submitted as a treaty. I think it would raise constitutional question as well as grave practical questions if you required the President in advance to make certain categories of agreements in treaties. Many times form of the agreements affects the substance. The fact it is a treaty gives it more dignity and significance internationally than on given occasions might be desirable.

Senator ERVIN. But that is——

Mr. BUZHARDT. It might create a difficult problem and interfere drastically with the conditions of our foreign relations.

Senator ERVIN. But that is precisely what the Congress did in section 33 of the Arms Control and Disarmament Act.

Mr. BUZHARDT. They put in the alternative there and I think in that particular case since it was in the alternative it left the President's condition of foreign relations to him as to which route he would choose and he could have an executive agreement and therefore not give it the significance internationally.

Senator ERVIN. But they could put it in the alternative, either (a) or (b), as Congress did, saying that there must be a subsequent treaty or subsequent act of Congress approving his action. Congress can specify either one of those alternatives if it wishes.

Mr. BUZHARDT. I don't agree, Mr. Chairman. I think they could do it one way or the other, but if you would prescribe one way or the other, you would interfere with the President's conduct of the foreign relations.

Senator ERVIN. All the President is doing there is carrying out the authority given him by Congress.

Mr. BUZHARDT. I know, but you are telling him how he will execute. I think there is a limit to the degree of whether—the limit is in the impairment of his ability to do it and his constitutional authority to conduct foreign relations.

Senator ERVIN. His negotiation is done. His negotiation is done before he ever makes his report to Congress.

Mr. BUZHARDT. Mr. Chairman, whether——

Senator ERVIN. But this act says it shall not be binding on the United States unless it is approved by subsequent treaty or subsequent act of Congress.

Mr. BUZHARDT. If it says or, I agree, as this does, but if it said one and excluded the other, then I think you would——

Senator ERVIN. I am totally incapable of comprehending how such a statute would hinder the President, because it doesn't affect his negotiation. His negotiation is complete.

Mr. BUZHARDT. It could very easily affect his negotiations because in the process of negotiating a treaty or executive agreement, it is often of importance to the Government which you are negotiating with whether or not the agreement which you signed will be considered by the United States to be a treaty or an executive agreement. It does have an international impact and a country might agree to do it one way but not the other regardless of the substantive terms.

Senator ERVIN. Well, that is something about the power of the other country, not the power of the Congress as I see it.

Mr. BUZHARDT. It is, but if you take this latitude away from the President to make within bounds the choice, then you impair his ability to make agreements and to negotiate agreements successfully.

Senator ERVIN. Well, I think Congress can make it either way. I can't see why the alternative is necessary, because the negotiations are completed before the President ever comes for the authorization or for the ratification, as the case may be. That is a matter between Congress and the President, not between the President and a foreign country. I think Congress can provide that an agreement must be submitted in the form of a treaty.

Mr. BUZHARDT. I would respectfully disagree with you, Mr. Chairman.

Mr. EDMISTEN. Mr. Buzhardt, don't you believe in retrospect that it would have been the better part of wisdom for the Spanish bases agreement and Azores agreement and Bahrein agreement to have been submitted to the Congress?

Mr. BUZHARDT. I wouldn't comment on it. I really have not been into it in that detail. I frankly have not even read the hearings on it.

Mr. EDMISTEN. Well, we were talking about embarrassment to the United States a moment ago. If S. 3447 which Senator Case has introduced were passed, it seems that it might cause embarrassment to the United States because it simply says unless those agreements are submitted as treaties, then the aid shall be cut off. The funding. I can conceive of that as being quite embarrassing and I think it could have been avoided had it been submitted as a treaty.

Mr. BUZHARDT. It probably would have been a bigger embarrassment in some instances if it had been submitted as a treaty. As a general rule I would not think a base agreement was the type of agreement which would merit the status of a treaty which requires Senate ratification. In the first place, it is an option on the part of the United States and I am speaking of a simple base agreement, not one which committed the United States to do something, but a simple base agreement that gives the United States the option to utilize a base on foreign territory which the country could not possibly do without the appropriations of the Congress and in many instances the authorization of military construction in mot countries I might say. I just don't think that is of sufficient significance to permit treatment as a treaty.

What I am trying to say here is that there are factors other than the concurrence or the procedures within this country relative to a treaty which bear on the issue of whether or not an agreement should be treated as a treaty or an executive agreement.

Senator ERVIN. But a lot of Senators disagree with that because when you establish a base and put your troops there, you make it certain, rather, you subject them to the potentiality of being attacked by a foreign nation and thus precipitating armed conflict.

Mr. BUZHARDT. Mr. Chairman, I agree, and if the Congress doesn't want troops there, they have adequate authority to keep them from being put there. In authorizing an appropriations bill, all they have got to do is say none of the funds appropriated herein shall be used for the payment of troops in a given country, and that is it.

Senator ERVIN. That is all very true, but the alternative is this. The President makes an agreement with a foreign country which is not very well versed on our constitutional processes, and Congress has no choice then except to ratify the action of the President, or repudiate him, and if Congress repudiates the action, it has a very disastrous effect on our foreign relations.

Mr. BUZHARDT. The same would be true if the President negotiated and submitted to the Congress and the Congress rejected.

Senator ERVIN. No, no, because they would know that the President is just negotiating in that case.

Mr. BUZHARDT. Mr. Chairman. It is inconceivable to me that any country with which we negotiate an option to use a base is not

aware of the fact that only the Congress appropriates the money. In fact, sometimes in dealing with these foreign countries, I think they know our congressional procedures better than some of our own people.

Senator ERVIN. I think they know about our constitutional and treaty making provisions, but I doubt very seriously they know all of the laws written in 113 or 114 volumes of our United States Code, because I don't know any American lawyers who know that.

Mr. BUZHARDT. I don't know either, but when it comes to things that affect those foreign countries, what those appropriations committees do and how they do it, I am under the impression they are thoroughly familiar.

Mr. EDMISTEN. I believe that you are not quite as concerned about this bill as the State Department is.

Mr. BUZHARDT. I am most concerned about this bill, Mr. Edmisten. I wouldn't know where to start if it were passed.

Mr. EDMISTEN. You wouldn't know what to send over to Congress?

Mr. BUZHARDT. I don't know what it applies to in the first place. I think it would impair the ability to negotiate in the most serious fashion. I think it would frankly—it could tie the Congress up in a great deal of trivia and cause the greatest type of constitutional questions and possibly even confrontations between the—constitutional confrontations between the executive and legislative branches. I certainly didn't mean to minimize my concern about the bill in anything I said.

Mr. EDMISTEN. Under interpretation of what an executive agreement is, how many do you think you would have to send from the Defense Department every year to the Congress?

Mr. BUZHARDT. I frankly have no idea. If you speak of executive agreement in the sense of the international law—they are called treaties generically—and in the sense of title 1, U.S.C., section 112(a), we wouldn't have to send any, I think, or a very few. The State Department would send them. If you talk about commitments which bind the United States which are made by—with another nation, which are made by the President or any officer or employee or representative of the executive branch of the U.S. Government, we would have to send to some other committee innumerable pieces of paper that we now send to somebody else. It is inconceivable we would have to send our sales contracts, and they get rather bulky. As I say, they run about 3,300 a year. I can't conceive that the Congress would want them or have any use in looking at them.

From my own standpoint they are contracts. We go through a long process, there is private participation in these. It is much like any bank loan. We render opinions. The opinions set forth the statutory authority and place the full faith and credit of the United States to some private lender, this type of guarantee. A thick set of documents and annexes describing technical equipment, depending on what is sold, conditions of the indemnity and who bears the risk of loss at various points, enormously technical sort of procedure.

The military assistance grants on grant aid, I can't conceive that Congress would want to wade through each one and have some responsibility to act or else hold them up for 60 days because they

are fairly standard format. If you want to know what they say, you can read the Foreign Assistance Act, in any given year, they were passed and you can find out just about what they say. They are a little more spelled out in detail but that is what they say. They say if we give you any foreign grants, you will abide by these terms. That is what it says. Then we can't give them any unless we come back to the Congress, justify the program, get the authorization and get an appropriation.

Senator ERVIN. They don't anticipate that Congress would trouble the executive department very much while the executive department was carrying out prior authorizations, do you?

Mr. BUZHARDT. I think it could—I think if you made these things—for instance, on sales agreements, if you make sales agreements conditioned for 60 days, I think you would seriously impair the sales program. The commercial world just doesn't abide, and this is a commercial type transaction, doesn't abide that kind of time. Time is often of the essence. In fact, we now get letters from Congress, most of them from individual Congressmen, imploring us to hurry up on most of our military sales agreements. Move faster.

Senator ERVIN. Well, I quite understand none of us like to have any laws that apply to us, and I understand the executive branch's opposition to any legislation which really would make effective the powers which Congress has to supervise the carrying out of the laws. I think it is a natural reaction. I don't like any laws that put any obligations on me, and I have been struck ever since I have been in Washington with the fact that the executive branch doesn't like congressional limitations.

Mr. BUZHARDT. I agree, Mr. Chairman, that we don't like limitations but I would disagree with you as to whether this bill would make a congressional act effective. I think it would be more likely to make it ineffective.

Senator ERVIN. Well, you have given us a very helpful and very illuminating and very comprehensive view of the subject to which the bill relates, and I want to thank you again.

Mr. BUZHARDT. Thank you, Mr. Chairman. It was a pleasure to be here.

Senator ERVIN. The record will be kept open for 10 days for further insertions.

(Whereupon, at 12:45, the hearing of the subcommittee was concluded.)

BIOGRAPHICAL INFORMATION—J. FRED BUZHARDT, JR.

J. Fred Buzhardt, Jr., was nominated by President Richard Nixon to be General Counsel of the Department of Defense on August 5, 1970, was confirmed by the United States Senate on August 13, and took the oath of office for the position on August 20.

Mr. Buzhardt, at the time of his appointment, was serving as Special Assistant to the Assistant Secretary of Defense for Administration. He also served as Special Assistant to the Chairman of the Blue Ribbon Defense Panel from June 30, 1969, to June 30, 1970.

As General Counsel, Mr. Buzhardt will be the chief legal officer of the Department, responsible for all legal services performed with and involving the Department of Defense.

Born in Greenwood, South Carolina, on February 21, 1924, Mr. Buzhardt attended Wofford College, Spartanburg, South Carolina. He graduated from the U.S. Military Academy with a Bachelor of Science degree in Military Engi-

neering in 1946, and received an LL.B. degree from the University of South Carolina in 1952.

Mr. Buzhardt served in the U.S. Army Air Corps from October, 1942, to July, 1943, and the U.S. Air Force from 1946 through 1950 as a First Lieutenant.

Mr. Buzhardt practiced law in McCormick, South Carolina, from 1952 through 1958. From 1958 through 1966, he served on the staff of Senator Strom Thurmond. He resumed his private law practice in 1966 and maintained his general practice until he joined the Department of Defense.

Mr. Buzhardt resides with his wife, the former Imogene Sanders, at 3817 Prince William Drive, Fairfax, Virginia. They have four children—Linda, 22; Joe F., III, 19; George, 17, and Jill, 15.

APPENDIX

[From the Congressional Record, vol. 117, No. 11, Feb. 4, 1971]

S. 596—INTRODUCTION OF A BILL RELATING TO EXECUTIVE AGREEMENTS

Mr. CASE. Mr. President, I introduce for appropriate reference a bill requiring the transmittal of all executive agreements to the Congress within 60 days of their execution.

In the closing days of the 91st Congress when I originally introduced this bill, it had become abundantly clear to me and, I believe, to many of my colleagues that one of the major deficiencies in our relationship with the executive branch which must be remedied is that of congressional access to the terms and conditions of this Nation's nontreaty agreements with foreign nations. Only with such full knowledge, which my bill is intended to provide, can the Congress carry forward the systematic and continuing review of U.S. commitments which was pioneered by the Symington Subcommittee on U.S. Security Agreements and Commitments Abroad during the session just past.

I hope that the executive branch soon will provide its formal response to my bill and I trust that the Committee on Foreign Relations shortly thereafter will begin consideration of this potentially far-reaching measure.

Fourteen years ago the Senate approved a similar measure introduced by former Senator William F. Knowland, but it was not subsequently voted upon by the House. It is now time for the Congress to complete this action previously begun.

The PRESIDING OFFICER (Mr. FANNIN). The bill will be received and appropriately referred.

The bill (S. 596) to require that international agreements other than treaties, hereafter entered into by the United States, be transmitted to the Congress within 60 days after the execution thereof, introduced by Mr. Case, was received, read twice by its title, and referred to the Committee on Foreign Relations.

S. 596, 92nd Cong. second sess.

A BILL To require that international agreements other than treaties, hereinafter entered into by the United States, be transmitted to the Congress within sixty days after the execution thereof

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 1, United States Code, is amended by inserting after section 112a the following new section:

“§112b. United States international agreements; transmission to Congress

“The Secretary of State shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Commit-

tee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President."

SEC. 2. The analysis of chapter 2 of title 1, United States Code, is amended by inserting immediately between items 112a and 112 the following: 112b. United States international agreements; transmission to Congress."

S. RES. 214, 92nd Cong. first sess.

RESOLUTION Relative to the submission of any Portuguese fare agreement as a treaty

Whereas the Constitution states that the President of the United States must have the advice and consent of two-thirds of the asenate in order to make treaties;

Whereas an agreement with Portugal, which would provide for the stationing of American troops overseas and which would furnish Portugal with large amounts of foreign aid, is clearly a matter of sufficient importance to necessitate its submission to the Senate as a treaty;

Whereas the Congress has the sole constitutional right to appropriate funds for foreign assistance programs: Now, therefore, be it

Resolved, That any new agreement with Portugal for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent.

No economic assistance should be furnished to Portugal without affirmative action by both Houses of Congress.

[From the Congressional Record, May 24, 1972]

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS—

(By Mr. Case)

S. 3637. A bill providing that no funds may be obligated or expended to carry out certain agreements to which the Senate has not given its advice and consent. Referred to the Committee on Foreign Relations.

MR. CASE. Mr. President, I am today introducing a bill which provides that no money can be spent to carry out an agreement with a foreign country for an American military base or for the storage of nuclear weapons in that country unless the agreement is submitted to the Senate as a treaty and the Senate then gives its advice and consent.

My bill would also apply to agreements with foreign countries which revise or extend military base or nuclear storage arrangements previously entered into.

The power of the purse is Congress' ultimate weapon, and I am proposing that it be used to right the imbalance which has grown up in the conduct of our foreign relations. I am trying to change the practice that has become so prevalent under the last six Presidents of entering into arrangements with foreign governments under the cover of so-called executive agreements and thus skirting the constitutional requirement for Senate advice and consent.

The Constitution is absolutely clear on this point. There is no question that our Founding Fathers intended that all major agreements with foreign countries be treaties, subject to Senate approval. They would not have accepted that the executive branch has the option simply to call an important commitment an executive agreement and put it into effect without the participation of the Senate. Yet, this is the current practice, and it is in direct conflict with the system of checks and balances that the Founding Fathers so carefully wrote into the Constitution.

My bill concentrates on two areas which are crucial to our national security. It does not include or exclude agreements on other subjects which, by virtue of their importance, should also be considered as treaties. Perhaps additional legislation will be necessary later.

But for now, I am chiefly concerned about, first, the stationing of American troops overseas in military bases and second, the storage of nuclear weapons abroad. Actions taken in either one of these areas can lead to a commitment toward the host country and ultimately to war. We cannot allow our country to become entangled in such serious obligations without the participation of the legislative branch, and through it, the American people.

There is no way that the Congress can compel the Executive to submit important agreements to the Senate as treaties. Yet Congress in turn does not

have to appropriate any funds to pay for the costs of the agreements. And the constitutionally mandated balance between the Executive and the Congress will not be restored until the Congress takes strong action to restore it.

I have long been concerned about the abuse of the executive agreement. Nearly 2 years ago I introduced a bill in the Senate which required the Executive to send all agreements with foreign countries to the Congress within 60 days of enactment. In this way Congress would at least have knowledge of what our Government had promised other countries. Despite the administration's initial opposition, the Senate passed this bill S1-0 in February. Only last week, the administration changed its position and announced it would no longer oppose this comparatively mild measure.

But over the last 6 months there have been new examples of executive agreements being used to put major deals into effect. Clearly, congressional knowledge of these agreements, while highly desirable, is simply not enough.

Last winter, the Executive entered into agreements with Portugal and Bahrain for American military bases. In the Portuguese case, our Government promised Portugal about \$435 million in credits and assistance over a 25-month period in return for continued use of bases in the Portuguese Azores. With Bahrain, we agreed on the establishment of military facilities on that Persian Gulf island at annual rental of several hundred thousand dollars a year.

I wrote to the administration asking that these two agreements be submitted to the Senate as treaties—but with no success. Then I introduced a Senate resolution which stated that the administration should submit the two agreements as treaties. This resolution passed the Senate 50 to 6 in March, but the administration refused to adhere to the sense of the Senate, which, of course, was not binding. I was not content to let the matter drop, and on April 4 I introduced a bill which cuts off all money to implement the Portuguese and Bahrain agreements until they are submitted to the Senate as treaties.

Mr. President, the Foreign Relations Committee yesterday approved this bill for the cutting off of implementing funds for the two agreements until they are submitted to the Senate as treaties. At the same time, the Foreign Relations Committee also approved the substance of the bill which I am introducing today. Thus, the specific fund cut off for Portugal and Bahrain and the broader measure blocking funds for future executive agreements on military bases and nuclear weapons storage will both be included in this year's Foreign Assistance Act which will soon be before the Senate.

Mr. President, I ask unanimous consent that a copy of the bill I am introducing be included in the Record along with an article I recently wrote for the Christian Science Monitor and other newspaper articles.

There being no objection, the bill and articles were ordered printed in the Record, as follows:

S. 3637

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no funds may be obligated or expended to carry out any agreement, on or after the date of enactment of this Act, between the Government of the United States and the government of any foreign country (1) providing for the establishment of a military installation in that country at which combat units of the Armed Forces of the United States are to be assigned to duty, (2) revising or extending the provisions of any such agreement, or (3) providing for the storage of nuclear weapons or the renewal of agreements relating to such storage, unless such agreement is submitted to the Senate for its advice and consent and unless the Senate gives its advice and consent to such agreement. Nothing in this Act shall be construed as authorizing the President to enter into any agreement, relating to any other matter, with or without the advice and consent of the Senate.

[From the Christian Science Monitor, May 15, 1972]

SEPARATION OF POWERS

(By Clifford P. Case)

As every schoolchild knows, the American constitutional system is based on checks and balances. Fearing the concentration of power in one man or even

one branch of government, the Founding Fathers wrote a Constitution in which each branch found its authority limited by the other two.

Thus, the executive was to make treaties with foreign countries, but these treaties were not to have effect until approved by two-thirds of the Senate. In this way, it was thought, the executive alone could not involve the country in a foreign entanglement.

Yet the practice has grown increasingly common under the last five presidents for the executive branch unilaterally to bind the United States in agreements with other countries. The device used has been the so-called executive agreement, which is nowhere mentioned in the Constitution. Under executive agreements, the United States has been committed to destroyers-for-bases, lend lease, Korean mercenaries, and Spanish bases. Congress has always been asked to pay the cost of these deals but has never been able to exercise its constitutional responsibility of considering them in advance.

Questions that vitally affect our national security should be treaties—not executive agreements.

In deciding which form to use, the real test must be: If it is important, it should be a treaty. And as Sen. Harry Byrd recently stated, "The doubt should be resolved in favor of the legislative (i.e., treaty) process."

For example, the stationing of American troops abroad can lead to a commitment to the host country and ultimately to war. It is simply too important a question, from both a constitutional and a practical standpoint, to be handled by the stroke of a diplomat's pen in an executive agreement.

Yet, in recent executive agreements, the United States "committed" itself to provide Portugal with about \$436 million in assistance and credits in return for a 25 month extension of the use of military bases in the Azores, and also agreed to pay several hundred thousand dollars a year to Bahrain for U.S. military facilities on that Persian Gulf island.

For the last five months I have been working to have these two agreements submitted to the Senate as treaties. When my informal approaches to the administration failed, in December I introduced a resolution calling for the treaty form to be used in both cases. On March 3, the Senate passed my resolution by a vote of 50-to-6.

Still in a March 21 letter, the administration stated that after "serious consideration," it would not submit the agreements to the Senate. Claiming that the agreements "were appropriately concluded as executive agreements," the State Department's only reaction to the overwhelming vote on my resolution was to "have noted the sense of the Senate."

I understand full well that a Senate resolution is not legally binding, so the State Department technically has the right only to "note it." Yet I must say that the attitude of the department was most unwise and shortsighted in the extreme.

At that point I was faced with two choices: Either I could let the matter drop—content to have a resolution with my name on it passed by the Senate—or I could at least try to take further action. I chose the latter course because I believed a fundamental constitutional question was at stake, and on April 4 I introduced a bill (S. 3447) which would cut off all the implementing provisions of the Portuguese and Bahrain agreements until they are submitted to the Senate as treaties.

The Senate cannot compel the executive to submit the agreements, but at the same time the Senate does not have to appropriate any money to pay for the costs of the agreements. The withholding of appropriations is Congress' ultimate recourse and should be used, albeit judiciously, in foreign as well as domestic affairs.

Some commentators have mentioned my actions as a part of what is known as the reemergence of Congress in foreign affairs. That is a correct interpretation as far as it goes. But I would look at it more as an effort to return to the letter and the intent of the Constitution. I am not at all interested in the aggrandizement of senatorial power for its own sake. What I am interested in is preventing the executive branch from committing our country to significant and often irrevocable courses of action without approval of the Congress and ultimately the people.

[From the New York Times, April 3, 1972]

AID CUTOFF URGE OVER BASE PACTS—AIM IS TO FORCE WHITE HOUSE TO SEEK SENATE APPROVAL

(By John W. Finney)

WASHINGTON, April 2.—Senator Clifford P. Case proposed today that Congress cut off all assistance to Portugal and Bahrain until the executive branch submits recent base agreements with the two countries to the Senate in the form of treaties.

The New Jersey Republican, contending that "a fundamental constitutional question is at stake," sought to provoke a confrontation with the Administration over its right to bypass the treaty-making powers of the Senate by entering into international executive agreements, which do not require the consent of Congress.

The tendency of the executive branch over the last three decades to rely upon executive agreements rather than treaties has been developing into a major issue as the Senate attempts to reassess what it regards as its foreign policy powers. The Case proposal represents the first attempt to use the ultimate power of Congress over the purse strings to force the executive branch to enter into treaties rather than executive agreements.

TO OFFER AMENDMENT

Senator Case announced that he planned to offer an amendment to the military aid authorization bill that would block all assistance promised to Portugal and Bahrain in recent base agreements until the Administration submitted the two executive agreements to the Senate as treaties.

The amendment would cut off \$435-million in credits and assistance promised to Portugal in return for a 25-month extension of base rights in the Azores and would prevent the payment of a few hundred thousand dollars in annual rent to Bahrain for the continued use of a small base by the Navy.

Senator Case said in a statement that he would have preferred that "this matter be handled in a less drastic fashion." But he said he felt he had no recourse in view of the Administration's "refusal to take heed of the Senate's will on this question."

On March 3 the Senate approved by a 50-6 vote a Case resolution urging the Administration to submit the Azores and Bahrain agreements to the Senate as treaties. The vote, the Senator said, was "significant not only because of the overwhelming majority by which it was adopted but also because Senators of all ideological persuasions joined in the effort to reassert the Senate's explicit constitutional role in the treaty-making process."

RESOLUTION IGNORED

Senator Case disclosed that the Administration had chosen to ignore the non binding resolution.

In a March 21 letter to the Senator, David M. Abshire, Assistant Secretary of State for Congressional Relations, said the State Department had "noted the sense of the Senate" but had decided not to submit the Azores and Bahrain agreements.

The State Department position, Mr. Abshire wrote, was that the base arrangements were "appropriately concluded as executive agreements" since they "involve no new policy on the part of the United States nor any new defense commitment."

The letter said that to seek Senate advice and consent "would be in our view carry a strong implication of new commitments that were not in fact intended by the parties."

Senator Case protested that the State Department's attitude was "most unwise" and "short-sighted in the extreme."

"The framers of the Constitution," he said, were explicit in their inclusion of the requirement for advice and consent of the Senate in the making of a treaty. And nowhere in the Constitution did they mention that the executive could skirt Senatorial approval by simply calling a pact with a foreign government an executive agreement."

"The Senate cannot compel the executive to submit any agreements," he said, "but at the same time the Senate does not have to appropriate any money to pay for the agreements' cost."

If the amendment were attached to the military aid bill, the issue would go to a Senate-House conference committee, where House conferees probably would oppose the restriction. But the Senate conferees, drawn from the Foreign Relations Committee, would be in a position to demand acceptance of the amendment as a price for approving the bill.

[From the Washington Post, April 3, 1972]

SENATE TO TEST NIXON POWER ON TREATIES

(By Spencer Rich)

Angry with the administration for refusing to submit the issue to the Senate in treaty form, Sen. Clifford P. Case (R.-N.J.) plans to move Tuesday to block the Nixon administration from setting up two military bases in Bahrain and the Portuguese-owned Azores islands.

Case announced that he will submit legislation cutting off all proposed U.S. payments to Portugal and Bahrain for the bases until the administration seeks each base agreement as a treaty requiring a two-thirds Senate vote.

The Case move which is expected to receive broad backing in the Senate, is another incident in the prolonged confrontation between the Senate and the Executive Branch over control of foreign policy. It is unlikely, however, that a Senate bill requiring submission of the accords as treaties would pass in the House.

Case contends that the base agreement with Portugal and Bahrain contain substantial commitments by the United States and should be submitted to the Senate in treaty form for ratification by the normal two-thirds vote. The Senate on March 3, by a 50-to-6 vote, passed a resolution asking that the agreements be submitted in treaty form.

However, the administration informed Case March 21 that it believes the agreements for the two bases were "appropriately concluded as executive agreements," and has declined to comply with the March 3 Senate request.

Assistant Secretary of State David M. Abshire, in a letter to Case, said the agreements for U.S. bases at the two locations "involve no new policy on the part of the United States nor any new defense commitment" He said that to submit the base agreements as treaties might "carry a strong implication of new commitments that were not, in fact, intended by the parties."

An executive agreement, unlike a treaty, need not be ratified by the Senate.

However, the two agreements still require enabling legislation to carry out the U.S. part of the agreement, and that is where Case intends to strike.

The agreement with Portugal extends U.S. base rights in the Azores for 25 months, Case said, in return for about \$435 million in U.S. assistance and credits. Case said he will seek to block all attempts to hand over the \$435 million—barring loans of vessels to Portugal, any type of sale of agricultural commodities, all transfers of educational funds and excess defense articles, and all export-import bank financing of any type for Portugal under the executive agreements.

Payments to Bahrain for establishment of a U.S. naval base in that Persian Gulf island also would be cut off.

Case said, "There is no question in my mind that in and of itself, the stationing of American troops overseas is an issue of sufficient importance to necessitate the use of the treaty process." He said the stationing of any troops abroad could lead to a commitment to the host country "and ultimately to war," and the Senate should have the right to pass on this risk.

Case said the dispute involved "a fundamental constitutional question"—whether the Senate has the right to review foreign policy actions which could lead to major U.S. commitments and involvements abroad. "The Senate cannot compel the Executive Branch to submit the agreements," said Case in a statement, "but at the same time the Senate does not have to appropriate any money to pay for the agreements' costs."

In his letter to Case, Abshire said the agreement on the Azores' base continuation "is in implementation of one already existing commitment" under the North Atlantic Treaty, which was approved by an overwhelming majority of the Senate."

He added, "We will continue to make every effort to keep the appropriate congressional committees informed of important agreements under negotiation and to consult with those committees whenever there is a serious question whether an international agreement is to be made in the form of a treaty or otherwise."

[From the Washington Post, April 7, 1972]

THOSE PACTS WITH PORTUGAL AND BAHRAIN

Last winter the United States made a formal agreement with Portugal to use Lajes field in the Azores, and it took over a British Persian Gulf facility in Bahrain to use as a base of its own. Contending that these executive agreements circumvented the Senate, Senator Case urged the administration to submit them both as treaties. It refused. The Senate then endorsed his plea, 50 to 6. Again the administration refused. So now he is asking the Senate to block funds or aid in any form from flowing to Portugal or Bahrain.

Mr. Case believes the fundamental question of the Senate's right to pass on pacts with foreign governments is involved, and we believe he is right. To argue that the United States has been using the Azores base for three decades—the last one without an agreement—begs the constitutional question posed by the formal renewal and ignores the key political question of Portugal's increasing involvement in wars in its three African colonies. As for Bahrain, the flimsiness of the State Department's argument—that there's no difference between using a British base and taking over that base—illustrates nothing so much as why the Department's estate has fallen as low as it has.

In the Portuguese case the political issue is particularly sharp. The package which included the base agreement also contained some \$35 million worth of assorted kinds of economic aid, plus possible access to as much as \$400 million in Export-Import Bank credits to finance civilian development exports to European Portugal. Many Americans, and not only blacks, wince at *any* American involvement with the anachronistic colonial regime in Lisbon, even for an ostensible purpose—NATO defense—which has no immediate connection with Africa. The administration, however, added injury to insult by lumping aid and credits into the base-renewal deal. The inevitable if not the intended result was to convey an impression of American endorsement of overall Portuguese policy—an impression, we might add, which Lisbon has avidly spread.

The Nixon administration's tendency to put more weight on United States economic interests and less on political questions, in its dealings with white minority governments in Africa, has been apparent for some time. Senator Case's bill assures the Congress an opportunity to make its own judgment on this matter.

[From the Philadelphia Inquirer, April 10, 1972]

TREATIES BY ANOTHER NAME

Sen. Clifford Case concedes his amendment to cut off aid to Portugal and Bahrain is somewhat more "drastic" than he would like it to be. It is also justified, however, if the Senate is to reassert its constitutional role in foreign affairs.

The New Jersey Republican's aim is to compel the Nixon Administration to submit two recently concluded executive agreements—one extending U.S. base rights in the Azores, the other continuing an American naval presence in the Persian Gulf—to the Senate as treaties.

Such was the sense of the Senate when, last March, by a vote of 50-6, it approved a resolution along those lines. But the resolution was not binding, and the administration refused to be bound by it.

The administration's position, which has ample precedent to support it, is that executive agreements are not treaties, which under the Constitution can-

not go into effect with out the approval of two-thirds of senators present on the floor.

But a treaty of another name is still a treaty—a pact entered into by the President in the name of the United States, and it may commit the nation even to war.

So the issue is not merely a matter of nomenclature or precedent—not merely, even the merits of the arrangements with Portugal and Bahrain.

The State Department explains that the agreements involve neither new policy nor new commitments. That may or may not be so, but how can the Senate find out if the agreements are not submitted to it, and why—even if the policy and commitments are old—should it not have an opportunity to make its own judgment anew?

Increasingly, over the past 40 years, Presidents have resorted to executive agreements to bypass the Senate. Sen. Case has also introduced a bill to require all executive agreements to be sent to Congress within 60 days. The issue there is the same as in the war powers bill which is also before the Senate.

It is, in Sen. Case's words, "a fundamental constitutional question" of whether the Congress is to exercise the co-equal status which the framers of the Constitution granted it. And one way to do so is by Congress' exercising its own constitutional power of the purse.

[From the Long Island Newsday, April 6, 1972]

WAR AND PEACE POWERS

Modern Presidents tend to do what they want to do with the nation's blood and treasure, with only the slightest nod in the direction of Congress, and without waiting for much of a nod in return. No one could foresee that the inadequately explained and virtually unchallenged Tonkin Gulf Resolution of 1964 would plunge us into an Asian war with both feet, and with no map showing us the way out. Many pieces of trivial legislation have received far more scrutiny. That bill gave the White House a pretext for continuing to usurp the war-making powers that properly belong to the people's elected representatives on Capitol Hill where the framers of the Constitution put them.

Congress must take much of the blame for letting that happen. It has the chance now to reclaim some of the authority assigned to it by the Constitution. Through legislation written principally by Sen. Jacob Javits (R. N.Y.), the President would be authorized to employ the armed forces only in certain specified emergencies, and for no longer than 30 days without congressional approval. These emergencies include an attack upon the United States, or its forces, or the threat of such attacks, or to protect American citizens being evacuated from foreign countries.

The Nixon administration argues that the bill infringes on the President's powers as commander-in-chief. Sen. Javits and other supporters say the bill leaves the President plenty of latitude to act, but it will prompt him to exercise more appropriate caution, prudence and precision than the White House, under three Presidents, has displayed in its past management of the Indochina wars.

The Javits bill would reinforce the basic law of the land, which requires the collective judgment of the President and Congress to go to war. It can't create national wisdom where there is none, but it can require collaboration by two branches of government on the life and death questions of war and peace.

Less crucial but also important to the national interest is collaboration in foreign affairs, where the White House has been by-passing the treaty-making powers of the Senate. Although the Senate already has approved overwhelming a resolution by Sen. Clifford Case (D-N.J.) that agreements negotiated by the White House with Portugal and Bahrain be submitted for consideration as treaties, the resolution was not binding and President Nixon chose to ignore it. Now, Case is going to the mat with the administration on this issue. He's asking that all assistance to those countries be withheld until the Senate receives the agreements in treaty form.

Case's tactic is welcome on several counts. The five-year agreement with Portugal for use of air and naval bases in the Azores is questionable militarily

and counter-productive politically. It is a slap in the face of black Africa, where it will be regarded as a \$436,000,000 subsidy to Portugal to maintain a repressive colonial policy.

The confrontation provoked by Sen. Case will determine whether congressional power over the purse strings can effectively bring back to Capitol Hill some of the constitutional authority it unfortunately has let slip away.

STATEMENT BY SENATOR CASE ON HIS PORTUGAL BAHRAIN RESOLUTION

Mr. President, it has become apparent that the overwhelming majority of the Senate favors the reestablishment of the Congressional role in the making of foreign policy.

Several weeks ago this body voted 81-0 in favor of my bill which requires the Executive Branch to submit copies of all executive agreements to the Congress within 60 days of their conclusion. The Administration had opposed this legislation on the grounds that informal arrangements could be worked out to accomplish the same ends. The Senate unanimously disagreed.

Similarly, the Senate will soon be voting on a bill which will define and limit the President's war powers. A consensus has clearly developed on this matter among Senators of varying ideological persuasions, as the co-sponsorship of Senators Javits, Stennis, Eagleton, and Spong indicates. I am confident that a large majority of the Senate will vote for a war powers bill, again because of the need to reestablish the Constitutional responsibility of the Congress in the national security area.

The two bills I have mentioned deal with the broad institutional structure of American foreign policy. Today we come down to the specific.

The question before us is whether, without the advice and consent of the Senate, the United States should enter into major agreements with the governments of Portugal and Bahrain.

The Constitution is explicit in requiring the advice and consent of the Senate before a treaty can be entered into force. The Constitution does not define the term "treaty". Yet, it seems clear that the Founding Fathers intended any agreement with a foreign country on a matter of substance to be embraced within the term. Certainly they did not intend that the President would be required to get Senate approval only of routine minor agreements with other nations.

Yet the practice has grown up within successive administrations to use the device of executive agreements to settle international matters of great importance.

Particularly in the post-World War II era the treaty making process has steadily declined in importance. Successive administrations have found it expedient to use the device of the executive agreement to put into effect pacts that fundamentally affected the national security of the United States. We have heard it said that since it feared that Senate approval might not be forthcoming for a particular deal, the administration in power did not choose to use the treaty process. We have heard that some agreements were simply too sensitive to be debated in the halls of Congress. We have heard that foreign governments did not want their relations with the United States discussed publicly.

Any of these arguments may have validity in terms of short range political expediency. They are not valid in our Constitutional system of law.

In testimony in favor of the resolution before us Senator Harry Byrd put the question into perspective:

"I believe that important principles are involved in this resolution, principles concerning the American system of checks and balances and the constitutional role of the Senate in foreign policy.

"The issue as I understand it is where should the line be drawn as to whether agreements with foreign nations should be executive agreement which does not require Senate action or by treaty which does require Senate approval.

"I am frank to say that I find difficulty in delineating a precise formula.

"Some issues are clear cut others are borderline.

"The agreements governing U.S. bases in the Azores and Bahrain possibly fall in the latter category. But in my view the doubt should be resolved in favor of the legislative process."

I agree with Senator Byrd. The agreements with Portugal and Bahrain are simply too important to be left to an exchange of diplomatic notes.

The resolution I have introduced concerns two recent agreements entered into by the Executive Branch without the use of the treaty-making process. The first was with Portugal. It provided for continued American use of military bases in the Azores in return for the United States providing Portugal with about \$435 million in credits and assistance. The second was an agreement with Bahrain for the establishment of an American military base in that country.

Both these agreements represent significant foreign policy moves. They both involve the stationing of American military forces abroad. As we have learned in the past this can lead ultimately to war.

In the case of Portugal we would be furnishing large amounts of assistance to a country which is presently involved in three separate colonial wars in Africa. Despite our ties to Portugal through the NATO Alliance, our Government has imposed an embargo on shipments of arms to Portugal for use in Africa. Many Americans have raised the question—and I am among them—whether providing such large amounts of assistance to Portugal would not be contrary to the stated U.S. Government position of supporting self-determination for the peoples living in Portugal's colonies.

The Bahrain agreement is significant in that it provides for a permanent American base in an area where we have never before had our own installation. Despite a State Department spokesman's statement that "all we are doing is changing landlords" the establishment of an American base in a foreign country is a very serious matter. Moreover a base in the Persian Gulf could potentially entangle us in the bitter dispute now raging among Iran, Iraq, Saudi Arabia, and several other states over territorial claims. The recent Iranian occupation of islands at the mouth of the Persian Gulf only points up the volatility of that part of the world. The Shah of Iran has now gone on public record in opposition to our presence in Bahrain.

If these agreements with Portugal and Bahrain are not important enough to be considered treaties then just what is a treaty?

I fully realize that the Administration claims there is no need for a treaty with Portugal on the Azores bases. In hearings before the Foreign Relations Committee Under Secretary of State Johnson said that in effect the Senate lost its right to pass on future agreements with Portugal when it approved the NATO treaty 23 years ago. The State Department reasoned that the new agreement with Portugal is authorized under the implementing provisions of the NATO treaty. In the case of Bahrain there is no previous treaty but the lack of Senate participation is justified by the fact we had earlier used the facilities on an informal basis and that the number of American personnel involved is comparatively small. I do not find the Department's arguments persuasive in either case.

I think it is only fair to say that much of the blame for the reduced state to which the Senate has come in this matter of agreements with foreign countries rightly belongs to the Senate itself. We have acquiesced for many years in the increasing encroachments made on our Constitutional responsibilities by the Executive Branch. To a considerable degree also this tendency was encouraged by the substantial weight of academic opinion. I am happy to say that the sentiment in both these areas seems to have changed in recent years.

More and more students of government and international affairs have made clear their concern at the aggrandizement of the Presidency and the diminution of Congress. And within the Senate itself there is increasing sentiment for the reassertion of our proper functions and the reassumption of our Constitutional responsibilities.

Twenty-nine Senators have joined as co-sponsors of my resolution. I appreciate their support.

Now I urge the Senate as a whole to approve this measure which represents another step in the reassertion of the Senate's powers in the making of foreign policy.

[From the Congressional Record, vol. 118, No. 56, April 11, 1972]

S. 3475

By Mr. ERVIN:

S. 3475. A bill to help preserve the separation of powers and to further the constitutional prerogatives of Congress by providing for congressional review of executive agreements. Referred, by unanimous consent, to the Committee on the Judiciary, and then to the Committee on Foreign Relations, if and when reported by the Committee on the Judiciary.

THE ROLE OF THE CONGRESS IN THE MAKING OF EXECUTIVE AGREEMENTS

Mr. ERVIN. Mr. President, today I introduce a bill which will help restore the balance of power between the executive and legislative branches of the Government in the area of international agreements made with foreign nations on behalf of the United States.

Because of the momentous separation of powers problems in this area, I should like to request that this measure be referred to the Senate Judiciary Committee where its Subcommittee on Separation of Powers will be afforded an opportunity to give a careful and definitive examination of the powers, duties, and prerogatives of the two branches of the Government in the area of international agreements.

In recent years, so-called executive agreements have been utilized time and time again in situations where many legal scholars believe that the treaty provisions of section 2, article II of the Constitution should have been followed. The Founding Fathers were, indeed, wise when they formulated the concept of shared powers between the legislative and executive branches of the Government in the making of international agreements. These learned men mentioned only one kind of international agreement in the Constitution: The treaty. From their bitter experience with tyrannical rule, they realized that a system of government serves the people best when its powers are disbursed among various repositories within the government. They were acutely aware that unrestrained Executive power leads to despotism, and for that reason they attempted to make certain that the Congress, as the most direct representative of the people, would play a role in the making of international agreements. To my mind, this bedrock principle is no less important in this era of rapid change and computerization than it was in the simpler times when our Constitution was written.

The bill I introduce is simple. It recognizes that the Founding Fathers' concept of shared powers in the area of international agreements has been substantially eroded by the use of so-called Executive agreements. In plain language, the measure defines Executive agreements and requires that the Secretary of State shall transmit each such agreement to both Houses of Congress. If, in the opinion of the President, the disclosure of any such agreement would be prejudicial to the security of the United States, the bill provides that it shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy. Under this injunction of secrecy only the Members of both Houses of the Congress shall be permitted to inspect the document.

The bill further provides that each Executive agreement transmitted to the Congress shall come into force and be made effective after 60 days—or later if the agreement so provides—unless both Houses pass a concurrent resolution expressing disapproval of the Executive agreement between the date it is transmitted to the Congress and the end of a 60-day period. In other words, the Congress, in its shared-power role, will have an opportunity to state that it does not approve of an Executive agreement during the 60-day period after the agreement is transmitted to the Congress.

To many, this measure may seem rather strict in its provisions; however, it appears to me that the executive branch of the Government would welcome a method whereby the Congress would share the responsibility for making international agreements which affect the international image of our Nation and its people, the allocation of our tax resources, and, in many instances, impinges upon the possibilities of achieving peace in the world.

In the very near future, the Subcommittee on Separation of Powers will begin hearings on the complex subject of Executive agreements as distin-

guished from treaties. It is my hope that these hearings will afford the Congress a basis for determining the sort of so-called Executive agreement which, under the provisions of the Constitution, should be submitted to the Congress for its approval and that this measure will provide a focal point for the many views which will be expressed before the subcommittee.

Mr. President, I ask unanimous consent that the bill be referred to the Committee on the Judiciary, with the understanding that after that committee has completed its consideration of the bill, it then be referred to the Committee on Foreign Relations; and I would like to assure the Senate and the Chair that I have consulted with the distinguished chairman of the Committee on Foreign Relations (Mr. FULBRIGHT) and he agrees to this unanimous-consent request as to the reference of the bill.

The PRESIDING OFFICER. Is there objection?

Mr. JAVITS. Mr. President, may I hear the unanimous-consent request?

Mr. ERVIN. It was that this bill, which deals with Executive agreements, shall be referred initially to the Committee on the Judiciary, and that after the Committee on the Judiciary has completed its consideration of the bill, it then be referred to the Committee on Foreign Relations. I assure the Senator from New York that I have consulted with the distinguished chairman of the Committee on Foreign Relations, and he has agreed to this reference.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ERVIN. Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD at this point.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 3475

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Whereas, the Constitution of the United States established a system of shared powers between the legislative and executive branches of the United States Government in the making of international agreements; and whereas, the Congress finds that its powers have been substantially eroded by the use of so-called executive agreements, and the Senate is thereby prevented from performing its duties under section 2. Article II, of the Constitution, which provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," and, whereas, the Congress is often prevented from participating in the conduct of foreign relations by way of prior statute or concurrent resolution, therefore be it enacted as follows:

SECTION 1. (a) In furtherance of the provisions of the United States Constitution regarding the sharing of powers in the making of international agreements, any executive agreement made on or after the date of enactment of this Act shall be transmitted to the Secretary of State, who shall then transmit that agreement (bearing an identification number) to the Congress. However, any such agreement the immediate disclosure of which would, in the opinion of the President, be prejudicial to the security of the United States shall instead be transmitted by the Secretary to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate written injunction of secrecy to be removed only upon due notice from the President. Each committee shall personally notify the members of its House that the Secretary has transmitted such an agreement with an injunction of secrecy, and such agreement shall thereafter be available for inspection only by such members.

(b) Except as otherwise provided under subsection (d) of this section, any such executive agreement shall come into force with respect to the United States at the end of the first period of 60 calendar days of continuous session of Congress after the date on which the executive agreement is transmitted to Congress or such committees, as the case may be, unless, between the date of transmittal and the end of the 60-day period, both Houses pass a concurrent resolution stating in substance that both houses do not approve the executive agreement.

(c) For the purpose of subsection (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

(d) Under provisions contained in an executive agreement, the agreement may come into force at a time later than the date on which the agreement comes into force under subsections (b) and (c) of this section.

SEC. 2. For purposes of this Act, the term "executive agreement" means any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States, and which is made by the President or any officer, employee or representative of the executive branch of the United States Government.

SEC. 3. (a) This section is enacted by Congress—

(1) as an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of concurrent resolutions described by subsection (b) of this section; and it supersedes other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) For the purposes of this section, "concurrent resolution" means only a concurrent resolution of either House of Congress, the matter after the resolving clause of which is as follows: "That the Congress does not approve the executive agreement numbered——transmitted to (Congress) (the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives) by the President on ———, 19—", the blank spaces therein being appropriately filled, and the appropriate words within one of the parenthetical phrases being used; but does not include a concurrent resolution which specifies more than one executive agreement.

(c) A concurrent resolution with respect to an executive agreement shall be referred to a committee (and all concurrent resolutions with respect to the same executive agreement shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives as the case may be.

(d) (1) If the committee to which a concurrent resolution with respect to an executive agreement has been referred has not reported it at the end of 20 calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the concurrent resolution or to discharge the committee from further consideration of any other concurrent resolution with respect to the executive agreement which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the concurrent resolution, is highly privileged (except that it may not be made after the committee has reported a concurrent resolution with respect to the same executive agreement), and debate thereon shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other concurrent resolution with respect to the same executive agreement.

(e) (1) When the committee has reported, or has been discharged from further consideration of, a concurrent resolution with respect to an executive agreement, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on the concurrent resolution shall be limited to not more than 10 hours, which shall be divided equally between those, favoring and those opposing the resolution. A motion further to limit debate is not debatable. An

amendment to, or motion to recommit, the concurrent resolution is not in order, and it is not in order to move to reconsider the vote by which the concurrent resolution is agreed to or disagreed to.

(f) (1) Motions to postpone, made with respect to the discharge from committee, or the consideration of a concurrent resolution with respect to an agreement, and motions to proceed to the consideration of other business, shall be decided without debate.

(2) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a concurrent resolution with respect to an executive agreement shall be decided without debate.

[From the Congressional Record, vol. 115, No. 105, June 25, 1969]

PROCEEDINGS AND DEBATE OF THE 91ST CONGRESS, SECOND SESSION

NATIONAL COMMITMENTS

A resolution (S. Res. 85) expressing the sense of the Senate relative to commitments to foreign powers.

Mr. ERVIN. Mr. President, Senate Resolution 85, the so-called national commitments resolution, signifies what hopefully may be an important watershed in our Nation's constitutional history. The resolution is evidence of the fact that the Senate has once again become alert to its responsibilities in the field of foreign affairs. This resolution is a declaration that the Senate henceforth will insist upon its constitutional prerogatives. And it is a promise to the American people that the Senate intends to discharge its obligations as the representative of the people's voice in the making of foreign policy. As such, I support the resolution wholeheartedly, and urge its adoption.

While I support the resolution and commend the efforts of the junior Senator from Arkansas in bringing it forth, I cannot help observing that it is unfortunate that such a declaration by the Senate has become necessary. The resolution is testimony to the fact that over the course of the past 50 years, and especially since World War II, the power to make foreign policy has shifted almost entirely to the President. This trend has gone so far that a theory has developed that the making of foreign policy is solely the president's prerogative. This view is held by a large segment of the Nation's political scientists. It is shared by much of the public and, needless to say, it is forcefully espoused by the executive branch as well.

Under this theory, Congress is considered to be little more than a rubber-stamp of the executive branch. The functions of Congress is to approve what the Executive does in foreign affairs, to appropriate the money it seeks without question or cavil, and to give its automatic consent and the support to whatever policy comes from the executive branch. As the foremost advocate of this theory, the Department of State often makes little effort to hide its belief that foreign policy is much too important and much too complicated to be left to the untutored mercies of mere Senators and Representatives. In its view, foreign affairs must be exclusively the concern of experts, of which class, the Department considers itself the epitome. The Department and those who share its views make the common mistake of the confusing information for knowledge and knowledge for wisdom. They are ignorant of that definition which is singularly appropriate in this context—that an expert is one who knows about nothing.

This feeling that the Senate intrudes upon the President's constitutional duties when it seeks to participate in the formulation of foreign policy reflects a state of affairs which has existed for some time. It is not a happy moment when the Senate must in a resolution declare that foreign policy is a product of "action taken by the executive and legislative branches of the U.S. Government." This is clear from the plain words of the Constitution. Unfortunately, because of the abdication of its constitutional responsibilities over the past decades, the point has now been reached when the Senate must try to regain—first symbolically, as by the adoption of the resolution—and then in practice, its coequal role in the formulation of foreign policy.

The present low state of the Senate's power in the field of foreign policy was forcefully brought home to me during hearings conducted by the Subcom-

mittee on Separation of Powers in mid-1967. The Subcommittee on Separation of Powers was established earlier in that year to examine the doctrine of division of powers established by the Constitution and to evaluate its modern strength and significance. At its first hearings, the subcommittee received testimony from the Senator from Arkansas (Mr. FULBRIGHT) and from the then Senator from Oregon, Mr. Morse, outlining their views of the responsibilities of Congress in the making of foreign policy. In their testimony they described the persistent trend to Executive supremacy in this field. The Senator from Arkansas (Mr. FULBRIGHT) summarized the major events which have marked the decline of congressional influence in foreign policy:

The authority of Congress in foreign policy has been eroding steadily since 1940, the year of America's emergence as a major and permanent participant in world affairs, and the erosion has created a significant constitutional imbalance. Many, if not most, of the major decisions of American foreign policy in this era have been executive decisions. Roosevelt's destroyer deal of 1940, for example, under which 50 American ships were given to Great Britain in her hour of peril in exchange for naval bases in the Western Hemisphere, was concluded by executive agreement, ignoring both the treaty power of the Senate and the war power of the Congress, despite the fact that it was a commitment of the greatest importance, an act in violation of the international law of neutrality, an act which according to Churchill, gave Germany legal cause to declare war on the United States. The major wartime agreements—Quebec, Tehran, Yalta, and Potsdam—which, as it turned out were to form the de facto settlement of World War II, were all reached without the formal consent of the Congress. Since World War II the United States has fought two wars without benefit of congressional declaration and has engaged in numerous small-scale military activities—in the Middle East, for example, in 1958, and in the Congo on several occasions—without meaningful consultation with the Congress.

That the Congress shares constitutional power with the executive branch in the making of foreign policy is clear, as I have said, from the plain words of the Constitution itself. In his statement to the subcommittee, Senator Morse summarized the powers in the field of foreign policy allocated to the President and to Congress:

Scholars in the field generally recognize that under the Constitution the powers in the field of foreign policy and war were divided between Congress and the President. The President was made Commander in Chief of the Army, Navy, and militia when called into service. He was given the power to receive Ambassadors and other Public Ministers and the duty to see that the laws be faithfully executed.

Congress was given the power to declare war, to raise and support armies and provide and maintain a Navy, to make rules governing these forces, to provide for organizing and calling forth the militia, and to regulate commerce with foreign nations. In addition, Congress was to make all laws necessary for carrying out the powers vested in the Government and was given the power of the purse through the provision that no moneys could be drawn from the Treasury without an appropriation by law.

In addition, of course, the Senate has the responsibility of confirming appointments to diplomatic posts and by two-thirds vote must give its "advice and consent" to treaties before they become effective.

Despite this constitutional power and responsibility, the post-World War II years have seen a failure on Congress part to play an active, creative role in the making of foreign policy. The report on the resolution by the Foreign Relations Committee traces the reasons for this decline:

[T]he basic cause has been the unfamiliarity of world involvement and recurrent crisis to the American people and their government. Prior to 1940 foreign crises were infrequent and therefore put no lasting strain on our institutions.

Since 1940 crisis has been chronic and coming as something new in our experience, has given rise to a tendency toward anxious expediency in our response to it. The natural expedient—natural because of the real or seeming need for speed—has been executive action.

In other words, the trend to Executive supremacy is a product of the cold war and of recurrent and almost constant crisis in which the stakes are often the very survival of this country and the world. Since the United States be-

came the major actor in world affairs, we have become involved in almost every event everywhere on the globe, and even our noninvolvement is a key element in the affairs of other nations. The sheer size, complexity, and critical nature of America's foreign policy has led to a feeling that only the President with his advisers can adequately formulate as well as execute foreign policy.

Congress itself acquiesced and supported the preeminent role of the Executive. Understandably, Congress became reluctant to question the judgment—before the fact—of the President and his advisers. The salutary principle of a non-partisan foreign policy—"Politics stops at the water's edge"—developed into a withdrawal of Congress from any significant role in the formulation of foreign policy.

Evidence of this withdrawal of Congress from its constitutional obligations can be seen in almost every aspect of our policy. In the years since World War II, for example, the treaty power which the President shares with the Senate has atrophied. Since 1946, the United States has become a party to more than 5,000 international agreements, but only 245 of them have been treaties. The great bulk are executive agreements. The executive agreement, of course, is a purely executive contract. Unlike the treaty, which requires two-thirds approval by the Senate, the executive agreement can be negotiated and executed without Senate advice or Senate consent. For the most part, the public and the Senate are not even aware when these executive agreements are made or what they contain.

In an effort to obtain a fuller understanding of the use of executive agreements and their influence on the distribution of power between the Executive and Congress in the field of foreign policy, the Subcommittee on Separation of Powers recently asked the Department of State to analyze all of the executive agreements entered into since World War II. The Department of State was requested to collect all the agreements, classify them by subject matter, and state the legal or constitutional authority under which they were made.

It took the Department almost 4 months to prepare the report the subcommittee requested on these 5,000 executive agreements. Their report totals almost 300 typewritten, legal-sized pages. It is not, I must stress, a reprint of the agreements nor an exhaustive analysis of their terms, their legal effect, or even their legal underpinning. It is merely a listing by subject matter of the agreements and a listing by citation of the authority for each.

The accompanying memorandum by the Department states:

From time to time comparisons are made between the number of treaties and the numbers of so-called executive agreements made . . . that this study covers nearly 5,000 international agreements other than treaties made during the period 1946-1968. During the same period, and not counting certain earlier treaties which were brought into force during the period, 245 treaties (121 bilateral, 124 multilateral) were made and brought into force and have been published or are in the process of being published in the *Treaties and Other International Acts Series* and the permanent statutory volumes (UST). A comparison merely on the basis of total figure is, of course, meaningless.

While it is true that the mere enumeration of these agreements is not conclusive proof that the executive agreement has supplanted the treaty, it is enough to warrant a full-scale study of the importance of the executive agreement and its effect on the Senate's role in treaty-making.

The Senate cannot take at face value the assertion by the Department that every agreement is properly based upon constitutional authority and that all are consistent with congressional delegations of authority and existing law. Many of them, it appears, were made according to the President's "inherent powers" to conduct foreign policy. But what those "inherent powers" consist of, and whether executive agreements signed under such authority trespass on the Senate's treaty powers, are questions which the Senate ought to answer for itself if it is to give substantive meaning to the resolution.

The quantitative increase in the use of executive agreements in recent decades has been matched by an increase in their qualitative standing. Where once the executive agreement was a decidedly subordinate instrument reserved for international "housekeeping" arrangements, now it is often alleged that the executive agreement stands on an equal footing with the treaty. It is commonly asserted, for example, that anything which can be done by treaty can be done by executive agreement. Thus, the President, under this view, has the power to determine whether the Senate will play any role in making foreign

commitments by his choice of using executive agreements or formal treaty. The logical result of such a theory is to make a dead-letter of the Senate's prerogatives under article II, section 2.

The executive agreement also may be in the process of becoming equivalent to the treaty in its effect on domestic law. Treaties, under the Constitution, are part of the supreme law of the land and prior, inconsistent statutes are inferior to provisions of treaties. Until recently, executive agreements were not thought to have this same legal standing. But the controversy last year over the international Anti-Dumping Code suggests that the executive branch would like to see even this distinction erased.

The international code was negotiated during the Kennedy round of international trade negotiations despite a prior warning from the Senate that the authority to negotiate did not extend so far as to authorize an agreement to prevent dumping of goods on the international market which was at variance with existing statutory law. Nonetheless, the U.S. representative negotiated an agreement which was in a number of respects inconsistent with the Anti-Dumping Act passed by Congress in 1921. Although the executive branch never actually conceded that there was a conflict between the two, it was generally agreed that the two were inconsistent. In my judgment this was a clear attempt on the part of the executive branch to utilize an executive agreement to repeal or modify prior existing statutory law adopted by Congress.

As a result of the dispute which arose over the 1967 code, the Senate adopted a provision in the Renegotiation Amendments Act of 1968 which would have suspended the code. However, the compromise language adopted by conference committee permits the code to come into effect but states that in the event of a conflict between the 1967 code and the 1921 act the latter is to govern. It is possible to interpret this series of events as precedent for the principle that executive agreements can modify prior inconsistent statutes unless the Congress takes affirmative steps, as it did in this case, to make clear that the prior legislation is still primary. If such a theory were accepted, then all legal distinctions between executive agreements and treaties would be eliminated. Executive agreements made by the President would then become part of the supreme law of the land without the necessity of ratification by the Senate.

If Congress is to reassert its prerogatives in foreign policy, as Resolution 85 declares, then one of its first tasks should be to scrutinize all past executive agreements to assure itself that each was made under proper legal and constitutional authority. Even more important, the Senate should demand to be informed of all future executive agreements as they are being negotiated and should satisfy itself that the United States is not entering into an international commitment by exclusively executive action which should instead be a product of the joint Senate-Presidential function of treaty-making.

The increase in use and importance of the executive agreement as been matched by the reduced role of the Senate in the treaty-making process itself. Treaties are now reserved for the most solemn of international commitments. It sometimes appears that the President submits international agreements in treaty form when he wishes to give particular public stature to an agreement. With the fanfare and publicity given to such agreements, the Senate has little actual power to alter their terms, or even express its views on the nature and scope of the obligations they represent. Invariably Senate misgivings about terms of treaties are represented as obstructionist tactics. The argument is repeatedly heard that so much time and trouble has gone into negotiations that nothing can be permitted which would jeopardize the agreements which have been reached.

The Subcommittee on Separation of Powers' hearings contain an editorial from the New York Times of March 10, 1967, which epitomizes this attitude. The Times said:

A treaty is a contract negotiated by the executive branch with the government of one or more other countries. In the process there is normally hard bargaining and the final result usually represents a compromise in which everyone has made concessions. Thus when the Senate adds amendments or reservations to a treaty, it is unilaterally changing the terms of a settled bargain. The practical effect of such action is really to reopen the negotiations and force the other party or parties to re-examine their previously offered approval.

Every time the Senate exercises this privilege it necessarily casts doubt upon the credibility of the President and his representatives and weakens the bargaining power of the United States in the international arena. The Senate's power to do this is unquestioned, but it is equally unquestionable that this power is best used only to express the gravest of concerns, especially in a period of crisis such as is posed by the Vietnam war and efforts to end it.

The Department of State is not aware of the fact that the Senate's ability to "advise" on major treaties is generally nullified by the pressures which are brought to bear to obtain its "consent." As long ago as 1953, Secretary of State Dulles displayed a commendable approach to the problem. He said:

"The Constitution provides that the President shall have power to make treaties by and with the advice and consent of the Senate. This administration recognizes the significance of the word "advice." It will be our effort to see that the Senate gets its opportunity to "advise and consent" in time so that it does not have to choose between adopting treaties it does not like, or embarrassing our international position by rejecting what has already been negotiated out with foreign governments."

The fact is, however, that the executive branch in practice prefers to take full advantage of the position expressed in the New York Times.

As an example of this approach at work I would cite the recent Senate action on the Nonproliferation Treaty. Certain Senators, including myself, were seriously concerned about the nature of the commitment that the treaty imposed upon the United States. Our concern was that the United States was obligating itself to come to the aid of any nation signing the treaty that was thereafter attacked with nuclear weapons or threatened with nuclear blackmail, and that this commitment went beyond our obligations under the United Nations Charter. Our belief that the Nonproliferation Treaty could be the basis for a major expansion of U.S. overseas commitments was based on a resolution passed by the United Nations Security Council and a simultaneous statement of the United States in the United Nations, both of which occurred only 11 days before the treaty was signed. These declarations were clearly for the purpose of assuring nonnuclear nations that signed the treaty that they would be protected from nuclear attack and blackmail. In my opinion, the resolution and U.S. statement amounted to a thinly veiled commitment that we would come to their immediate assistance. In other words, the United States was giving an implicit guarantee of protection to these nations as the price for their accepting the treaty.

Since supporters of the treaty denied that this was the correct interpretation of these statements and assurances, I introduced a reservation to the treaty to make their judgment crystal clear. My purpose was to make certain that no nonnuclear nation would sign the treaty under the misapprehension that the United States, by these words, had made a national commitment to send our boys into battle again to die, without authorization from the Congress of the United States. As I said at the time of the debate on the treaty, we have had much less than this get us into war in the past. I said:

We are in a war today, a war in which over 32,000 American boys have been killed in South Vietnam. We were placed in that war by the act of the President of the United States. He did not have a single statement to make as strong as this reply of the United States to the resolution in the United Nations Security Council to justify his actions.

The reaction from the Department of State to Senate efforts to clarify the treaty was that any attempt to attach a reservation would destroy the delicate political agreement that had been reached. If a reservation were adopted, the treaty would have to be renegotiated. In the words of the Department, a reservation would cause "a stampede which might very well mean the demise of the treaty." Even my alternative of adopting an "understanding"—which is a purely domestic matter between the President and the Senate—was rejected. Again, the argument was that such a step might be misinterpreted by other nations and destroy the treaty's acceptability to them.

It is my feeling that the Senate had an obligation to make clear its views on the nature and extent of the commitments contained in the treaty. It was evident that the Senate was not in favor of any new commitment of the United States to defend nations attacked or threatened by nuclear weapons other than those imposed by existing treaty obligations. It is my judgment that the Senate ought to have made this interpretation explicit in the form of

a "reservation," or at least an "understanding." Our experience in the past has shown us that vague words which all agree at one moment in history mean one thing, can at another point in time be used as the basis for quite a different purpose. What individual Senators may think deep in their hearts about the meaning of a treaty is irrelevant if its words and legislative history mean something else entirely. In acts as important as the ratification of treaties, the Senate has an obligation to make explicit its views on the nature and limits of the obligations which the United States is incurring. And especially in so critical an area as nuclear policy we should be extremely reluctant to substitute private faith in unofficial assurances for explicit limitations that no one can mistake or misinterpret. In the past, we have seen to our dismay what can result from vaguely worded grants of power or authority.

The story of the Nonproliferation Treaty is illustrative of the low state to which the Senate's role in treaty-making has fallen. Since treaties are reserved for major declarations, and there is no room for reservations or understandings, the Senate generally is left with little choice but to approve them, lest the President be repudiated in the eyes of the whole world. As a consequence, major treaties do not offer much room for the Senate in the exercise of its "advice and consent" function.

Of course, the reduced role of the Senate and Congress in foreign policy is best illustrated by the events leading up to our major involvement in Vietnam. As has happened all too often in recent years, the President sought congressional approval of his actions in the heat of crisis. The Congress always finds it difficult to refuse a President when he calls for national support at such a moment. There has been much debate over the legal character and effect of the Tonkin Gulf resolution. In my judgment the resolution did authorize the President to put the Armed Forces into Vietnam, however wise a decision that may have been.

Debate on the meaning of the resolution has led in turn to a consideration of the larger question of whether the President has inherent power to commit U.S. forces to fight overseas in the absence of congressional authority. Those who hold to this view argue that in these modern times the President must and does have the independent power to employ American armed might in the world in order to safeguard our national security. Implicit in this view and perhaps explicit is the idea that the Constitution is outmoded. I cannot agree with such a view.

In *Youngstown Sheet & Tube Co. against Sawyer* the famous case on the legality of President Truman's seizure of the steel mills during the Korean war, the issue of the President's "inherent war powers" was raised. Mr. Justice Black's opinion in that case contained what I regard as the most ringing reaffirmation of the doctrine of separation of powers that has ever been made. In rejecting the contention that the President had the power to seize the steel mills as an exercise of his authority as Commander in Chief Justice Black said the power belonged to Congress. The existence of a crisis was no excuse for going beyond the words of the Constitution. Justice Black said:

"The founders of this nation entrusted the law-making power to the Congress alone in both good and bad times."

I do not claim to be an expert on the subject of the war powers of the President or of the Congress. I have, however, given a lot of thought and study to it. I have concluded that a distinction must be drawn between defensive warfare and offensive warfare. There is no doubt whatever that the President has the authority under the Constitution, and, indeed, the duty, to use the Armed Forces to repel sudden armed attacks on the Nation. But any use of Armed Forces for any purpose not directly related to the defense of the United States against sudden armed aggression, and I emphasize the word "sudden," can be undertaken only upon congressional authorization. In other words, the power of the President as Commander in Chief of the Army and Navy under the Constitution, when not acting pursuant to congressional authority, is wholly defensive in nature; Congress and Congress alone, by virtue of its constitutional right to declare war, has the power to authorize the employment of the Armed Forces of the United States in offensive warfare.

My position that the power of the President to employ the Armed Forces of the United States is limited to defensive warfare—that is, to resist any attacks upon the United States—and that Congress has the constitutional power to declare war, and that only Congress can authorize the President of the

United States to use the Armed Forces of the United States in offensive war, is sustained by three separate provisions of the Constitution.

The first is found in clause 11 of section 8 of article I of the Constitution, which expressly provides that Congress shall have the power to declare war. That refers to wars which may be designated as offensive wars.

Then there are two provisions in the Constitution which recognize that this country can fight in its own defense without any authorization by Congress.

The first of these is found in clause 3 of section 10 of article I of the Constitution, which provides that no State shall engage in war unless actually invaded or in such imminent danger as will not admit of delay. Under this provision even a State can go to war to defend itself against invasion or imminent threat of invasion, without the consent of the National Government.

The other provision of the Constitution is found in section 4 of article IV. It provides that "the United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion."

Those constitutional provisions make these two propositions crystal clear: First, that the President has no power under the Constitution to put this Nation at war when the war is offensive in nature; and, second, that the President, or even a State, can fight in self-defense to repeal invasion, without the consent of the Congress.

When the people of the United States adopted the Constitution, vesting in Congress alone the power to authorize offensive warfare, they contemplated that the Members of the Senate and the Members of the House of Representatives should determine, in the exercise of their own judgments, whether sufficient justification exists for committing the Armed Forces of the United States to offensive warfare before they authorize the waging of such warfare. They did not intend that the Members of the Senate and House of Representatives should abdicate their constitutional power and responsibility by delegating to the President the power to engage in offensive warfare or by acquiescing after the fact in such an improper utilization of the Armed Forces.

If, as some believe, the Constitution has become outmoded in respect to which branch should exercise the war power—a view with which I strongly disagree—then the Constitution should be changed by the amendment processes and not by extralegal action of the President and the Congress. I am not impressed with the recitation of precedents to support de facto constitutional amendments. Even 200 years cannot make constitutional what the Constitution declares is unconstitutional.

Mr. President, when the Senate seeks to regain its constitutional role in the field of foreign affairs, much more is at stake than a formalistic observance of a paper distribution of powers, prerogatives, and functions. The framers of the Constitution did more in devising that document than merely deal out the elements of power among three branches of the Government. They recognized that in a government resting ultimately on the consent of the governed, a balance must be struck between the need to have power and exercise it, and the need to control power and keep it disciplined. They sought to strike a balance between tyranny on the one hand and anarchy on the other. This principle was recognized as applicable to foreign policy as well as to domestic policy. It was for this reason that they gave Congress and especially to the Senate such important responsibilities in this field. The Senate's ultimate responsibility is to make certain that our Nation's foreign policy remains responsive to the wishes of the people. This is because in a democratic society, no policy, however enlightened, can long survive without the consent and support of the people.

The importance of the congressional role in formulating foreign policy lies in mobilizing and expressing popular support. Through the Congress, the people have a voice and a way to make it heard. Neither the Department of State, nor the Supreme Court, nor even the President can perform this great function of giving expression to the people's wishes on an issue.

This is the lesson that the debacle in our Vietnamese policy has taught us. Because foreign policy had become the province of the Executive, the decisions and the policy of the United States were not made with the active participation of the people. Instead, policy was made exclusively within the executive branch. The Congress, the Senate, and the country were asked to support that policy, which for some time they did, but they were never asked for their con-

sent, and they never had a hand in the making of the policy. Regardless of the merits of our decision to wage war in Vietnam, it has become tragically clear that the people will not support forever a policy which is made for them, but without them.

The consequences of this failure to observe the Constitution are all too evident. True, no Supreme Court decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory, an incumbent President was forced from office. Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandinavia rather than bear arms in the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon. Now we have riots and violence on our university campuses. ROTC programs are being forced out of schools, and there is dissension and antiwar activity even among those in uniform.

Perhaps not all the anarchy we see today has been caused by the Vietnamese war and the way in which we became involved. No one can say. But no one can say that the war was not the cause, or at least the catalyst. And I cannot shake the feeling that ultimately the reason so many are now disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam.

Sadly, if we needed proof, we once gain can see the wisdom of the framers' determination that the representative branch of the Government should play a key role in the making of foreign policy. Senate Resolution 85 does not fulfill the constitutional responsibility. It merely testifies to an awareness of it that had been lost for far too long. Adequate exercise of the Senate's functions in making policy requires a constant, forceful assertion of that role in all proper circumstances. If the Senate has once again become sensitive to its responsibilities, then proof must be in its actions.

But we must be wary of mistaking opposition pure and simple for the partnership in policymaking that is required between President and Congress. The Senate's responsibility is not fulfilled by obstructionism any more than by abdication of judgment and unthinking acquiescence. The Senate did not exercise its constitutional responsibilities 50 years ago by driving us into isolationism, neutrality, and blind pacifism. The tragedy of World War II should be proof enough that isolation, pacifism, and a blindness to the realities of national security is not the way for the Senate to "advise and consent" in foreign policy.

I commend the Senator from Arkansas for his efforts to bring this resolution to the attention of the Senate, and for his efforts to reawaken a stronger sense of the Senate's constitutional responsibilities.

While we may not always agree on the direction in which the Senate should exercise its responsibilities in foreign affairs, I think we have always been together on the need for a more vigorous Senate role. The Senator has performed a public service of the first importance in causing this debate on the constitutional obligations of the Senate.

[From the Congressional Record, vol. 113, No. 118, July 31, 1967]

Proceedings and Debates of the 90th Congress, First Session

U.S. COMMITMENTS TO FOREIGN POWERS

Mr. FULBRIGHT. Mr. President, I send to the desk a resolution and ask that it be stated.

The PRESIDING OFFICER (Mr. McCARTHY in the chair). The resolution (S. Res. 151) will be stated.

The legislative clerk read as follows:

S. RES. 151

Whereas accurate definition of the term, national commitment, in recent years has become obscured: Therefore be it

Resolved, That it is the sense of the Senate that a national commitment by the United States to a foreign power necessarily and exclusively results from

affirmative action taken by the executive and legislative branches of the U.S. Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment.

The resolution (S. Res. 151) was received and referred to the Committee on Foreign Relations.

Mr. FULBRIGHT. Mr. President, I rise to speak on one aspect of the mounting problem created by the gradual erosion of the role of the Congress, and particularly of the Senate, in the determination of national security policy. And I intend to suggest to my colleagues a course of action which, although modest in scope, could constitute a first step toward arresting a trend of events injurious to the best interests of our country.

There is no need at this time to rehearse all the evidence in support of the view, held by most if all Members of this body, that the authority of Congress in many respects has been dwindling throughout the years since our entry into the Second World War. The very existence of the Special Subcommittee on Separation of Powers, chaired by the distinguished senior Senator from North Carolina [Mr. ERVIN], currently attests to the concern felt by Senators on this score. In no area is the constitutional imbalance more striking and more alarming than in the field of foreign policy. As a result of the kind invitation of Senator ERVIN, on July 19, I gave to his subcommittee a rather lengthy statement, entitled "Congress and Foreign Policy," which I hope helped define the dimensions of the problem; I shall ask that the statement appear in the RECORD to follow and give more substance to these remarks.

Because the overall subject of the constitutional role of the Congress in both national and international affairs is now being scrutinized under such distinguished auspices, it would be neither wise nor proper at this time to prejudge the findings and offer recommendations applying to the whole field of inquiry. However, I believe that one facet of the problem in the foreign policy sphere can and should be singled out for prompt attention and action. I refer to the question of what constitutes a "national commitment" and I offer herewith a resolution stating simply that the term "national commitment" is understood to result from nothing less than formal action taken by the legislative and executive branches under established constitutional procedures.

A commitment thus defined engages the honor of the Nation in support of a specific undertaking. Obviously, such a process and such a result should neither be invoked frequently nor arrived at lightly. And yet over the years we have found ourselves confronted with multiplying calls for swift and decisive action to be taken on the basis of alleged "national commitments." Admittedly, many of these cries for action have come from nonofficial sources. But all too often over a long period the executive branch has indeed acted and then sought to justify its intervention by dubious references to equally dubious prior commitments.

These so-called "prior commitments" often turn out to be statements previously made by someone saying that we pledge ourselves to some undertaking.

Much of the difficulty here, I believe, stems from a lack of precise thought and language, rather than from any malign intent or influences. Even so, the possible consequences of involvement in combustible situations abroad in this day and age are too dangerous to permit any use of military power on the casual assumption that the Nation is committed to act. Neither should we allow the honor of this country, which is at stake in its commitments, to be cheapened through constant and careless references to its involvement in specific situations.

We in governmental life frequently err by refusing to define our terms and by falling back on clichés which really have not been examined in years. In the field of foreign policy certain phrases reasonably descriptive of the world situation two decades ago are being used almost ritualistically without reappraisal of their relevance to current conditions. Other phrases have been so affected by constant misuse that their original meaning to the American public has been either twisted or entirely lost. The term "national commitment" clearly seems to have fallen into that latter category. In speaking today I am trying to recover and refurbish its original and true meaning from the cloud of confusion which has been created in large measure over the past two or three decades through the increasing conduct of foreign policy by executive agreement.

This resolution in no way tries to interfere with the day-to-day conduct of our foreign affairs. It does not attempt to restrict the constitutional responsi-

bility and power of the President or to revoke any past decisions. It does not respond to any current crisis situation abroad, and it is not a measure directed against any single administration in this century—or against anyone at all.

In its essence, this resolution represents a conservative position which seeks to recover in some degree the constitutional role of the Senate in the making of foreign policy—a role which the Senate itself has permitted to be obscured and diminished over the years. Just as we do not blame external forces for that cumulative loss of our traditional authority, I suggest to my colleagues that we will have only ourselves to blame if we do not reaffirm the power and responsibility given to this body by the framers of our Constitution.

Mr. President, I ask unanimous consent to have printed in the RECORD my statement of July 19 entitled "Congress and Foreign Policy," given before the Subcommittee on Separation of Powers of the Judiciary Committee of the Senate.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

CONGRESS AND FOREIGN POLICY

(Statement of Senator J. W. FULBRIGHT before the Subcommittee on Separation of Powers of the Judiciary Committee, July 19, 1967)

In a statement to the Senate Preparedness Subcommittee on August 25, 1966, Secretary of State Rusk said: "No would-be aggressor should suppose that the absence of a defense treaty, Congressional declaration or U.S. military presence grants immunity to aggression." The statement conveys a significant message to any potential aggressor: that under no circumstances could it count on American inaction in the event of an act of aggression. The statement conveys an implicit but no less significant message to the Congress: that, regardless of any action or inaction, approval or disapproval, of any foreign commitment on the part of the Congress, the executive would act as it saw fit in response to any occurrence abroad which it judged to be an act of aggression. It is unlikely that the Secretary consciously intended to assert that Congressional action was irrelevant to American military commitments abroad; it seems more likely that this was merely assumed, taken for granted as a truism of American foreign policy in the 1960's.

I. THE CONSTITUTIONAL IMBALANCE

The authority of Congress in foreign policy has been eroding steadily since 1940, the year of America's emergence as a major and permanent participant in world affairs, and the erosion has created a significant constitutional imbalance. Many if not most of the major decisions of American foreign policy in this era have been executive decisions. Roosevelt's destroyer deal of 1940, for example, under which 50 American ships were given to Great Britain in her hour of peril in exchange for naval bases in the Western Hemisphere, was concluded by executive agreement, ignoring both the treaty power of the Senate and the war power of the Congress, despite the fact that it was a commitment of the greatest importance, an act in violation of the international law of neutrality, an act which, according to Churchill, gave Germany legal cause to declare war on the United States. The major wartime agreements—Quebec, Tehran, Yalta and Potsdam—which, as it turned out, were to form the *de facto* settlement of World War II, were all reached without the formal consent of the Congress. Since World War II the United States has fought two wars without benefit of Congressional declaration and has engaged in numerous small-scale military activities—in the Middle East, for example, in 1958, and in the Congo on several occasions—without meaningful consultation with the Congress.

New devices have been invented which have the appearance but not the reality of Congressional participation in the making of foreign policy. I shall elaborate on these later in my statement and wish at this point only to identify them. One is the joint resolution; another is the Congressional briefing session. Neither is a satisfactory occasion for deliberation or the rendering of advice; both are designed to win consent without advice. Their principal purpose is put the Congress on record in support of some emergency action at a moment when it would be most difficult to withhold support and, therefore, to spare the executive subsequent controversy or embarrassment.

The cause of the constitutional imbalance is crisis. I do not believe that the executive has willfully usurped the constitutional authority of the Congress; nor do I believe that the Congress has knowingly given away its traditional authority, although some of its members—I among them, I regret to say—have sometimes shown excessive regard for executive freedom of action. In the main, however, it has been circumstance rather than design which has given the executive its great predominance in foreign policy. The circumstance has been crisis, an entire era of crisis in which urgent decisions have been required again and again decisions of a kind that the Congress is ill-equipped to make with what has been thought to be the requisite speed. The President has the means at his disposal for prompt action; the Congress does not. When the security of the country is endangered, or thought to be endangered, there is a powerful premium on prompt action, and that means executive action. (I might add that I think there have been many occasions when the need of immediate action has been exaggerated, resulting in mistakes which might have been avoided by greater deliberation.)

The question before us is whether and how the constitutional balance can be restored, whether and how the Senate can discharge its *duty of advice and consent* under continuing conditions of crisis. It is improbable that we will soon return to a kind of normalcy in the world, and impossible that the United States will return to its pre-1919 isolation. How then can we in the Congress do what the Constitution does not simply ask of us, but positively requires of us, under precisely the conditions which have resulted in the erosion of our authority? It is not likely that the President, beset as he is with crisis and set upon by conflicting pressures and interests, will take the initiative in curtailing his own freedom of action and restoring Congressional prerogative—that would be too much to expect of him. It is up to the Congress, acting on the well-proven axiom that the Lord helps those who help themselves, to re-evaluate its role and to re-examine its proper responsibilities.

I have the feeling—only a feeling, not yet a conviction—that constitutional change is in the making. It is too soon to tell, but there are signs in the Congress, particularly in the Senate, of a growing awareness of the loss of Congressional power, of growing uneasiness over the extent of executive power, and of a growing willingness to raise questions that a year or so ago might have gone unasked, to challenge decisions that would have gone unchallenged, and to try to distinguish between real emergencies and situations which, for reasons of executive convenience, are only said to be emergencies.

Prior to redefining our responsibilities, it is important for us to distinguish clearly between two kinds of power, that pertaining to the shaping of foreign policy, to its direction and purpose and philosophy, and that pertaining to the day-to-day conduct of foreign policy. The former is the power which the Congress has the duty to discharge, diligently, vigorously and continuously; the latter, by and large calling for specialized skills, is best left to the executive and its administrative arms. The distinction of course is clearer in concept than in reality, and it is hardly possible to participate in the shaping of policy without influencing the way in which it is conducted. Nonetheless, we in the Congress must keep the distinction in mind, acting, to the best of our ability, with energy in matters of national purpose and with restraint in matters of administrative detail.

Our performance in recent years has, unfortunately, been closer to the reverse. We have tended to snoop and pry in matters of detail, interfering in the handling of specific problems in specific places which we happen to chance upon, and, worse still, harassing individuals in the executive departments, thereby undermining their morale and discouraging the creative initiative which is so essential to a successful foreign policy. At the same time we have resigned from our responsibility in the shaping of policy and the defining of its purposes, submitting too easily to the pressures of crisis, giving away things that are not ours to give; the war power of the Congress, the treaty power of the Senate and the broader advice and consent power.

II. THE LEGISLATIVE FUNCTION

Insofar as the Congressional role in foreign policy is discharged through the formal legislative process, the Congress by and large has been able to meet its responsibilities. Unfortunately, however, the area of foreign policy requiring formal legislative action has diminished greatly in recent decades and now

contains virtually none of the major questions of war and peace in the nuclear age. Before turning to these critical questions, which go the heart of the current constitutional crisis a word is in order about the limited areas of foreign policy which are still governed by the legislative process.

Foreign aid provides the closest thing we have to an annual occasion for a general review of American foreign policy. It provides the opportunity for airing grievances, some having to do with economic development, most of them not, and for the discussion of matters of detail which in many cases would be better left to specialists in the field. It also provides the occasion for a discussion of more fundamental questions, pertaining to America's role in the world, to the areas that fall within and those which exceed its proper responsibilities.

In the last few years the Congress has shown a clear disposition to limit those responsibilities and has written appropriate restrictions, mostly hortatory, into the foreign aid legislation. Only as it has become clear that the executive is disinclined to comply with many of our recommendations has it been found necessary to write binding restrictions into the law. These mandatory restrictions, it is true, impose a degree of rigidity on the executive and constitute a regrettable Congressional incursion on matters of the day-to-day conduct of policy. Here, however, we encounter the overlap in practice between the shaping and conduct of policy and, in order to exert our influence on the one, where it is desirable, we have also had to exert it on the other, where it is not. Were the executive more responsive to our general recommendations—as expressed in committee reports, conditional proscriptions, and general legislative history—it would be possible for us to be more restrained in our specific restrictions.

The matter, at its heart, is one of trust and confidence and of respect of each branch of the government for the prerogatives of the other. When the executive tends to ignore Congressional recommendations, intruding thereby on Congressional prerogative, the result is either a counter-intrusion or the acceptance by the Congress of the loss of its prerogatives. Thus, for example, the persistent refusal of the executive to comply even approximately with Congressional recommendations that it limit the number of countries receiving American foreign aid has caused the Foreign Relations Committee to write numbers into its current bill, proposing thereby to make recommendations into requirements. The price of the flexibility which is valued by the executive is, or certainly ought to be, a high degree of compliance with the intent of Congress.

There are occasions when the legislative process works almost as it ideally should, permitting of the rendering of advice and consent on the matter at hand and also of the formation and expression of the Senate's view on some broader question of the direction of our foreign policy. Such was the case with the test ban treaty in 1963. In the course of three weeks of public hearings and subsequent debate on the floor, the Senate assured itself of the safety of the proposed commitment from a military point of view and at the same time gave its endorsement to the broader policy which has come to be known as "building bridges" to the east. Similarly, the ratification earlier this year of the Soviet consular treaty, which, but for an unexpected controversy might have been treated as routine business, became instead the occasion for a further Senate endorsement of the bridge building policy.

III. ADVICE AND CONSENT

The focus of the current constitutional problem—one might even say crisis—lies outside of the legislative process, in the great problems of war and peace in the nuclear age. It is in this most critical area of our foreign relations that the Senate, with its own tacit consent, has become largely impotent. The point is best illustrated by concrete examples. Permit me to recall some recent crises and the extremely limited role of the Senate in dealing with them:

At the time of the Cuban missile crisis in October 1962, many of us were in our home states campaigning for re-election. On the basis of press reports and rumors we had a fairly accurate picture of what was happening, but none of us, so far as I know, were given official information until after the Administration had made its policy decisions. President Kennedy called the Congressional leadership back for a meeting at the White House on Monday, October 22, 1962. The meeting lasted from about 5 p.m. to about 6 p.m.; 7 p.m. Presi-

dent Kennedy went on national television to announce to the country the decisions which had of course been made before the Congressional leadership were called in. The meeting was not a consultation but a briefing, a kind of courtesy or ceremonial occasion for the leadership of the Congress. At that meeting, the senior Senator from Georgia and I made specific suggestions as to how the crisis might be met; we did so in the belief that we had a responsibility to give the President our best advice on the basis of the limited facts then at our command. With apparent reference to our temerity in expressing our views, Theodore Sorensen in his book on President Kennedy described this occasion as "the only sour note" in an otherwise flawless process of decision making. It is no exaggeration to say that on the one occasion when the world has gone to the very brink of nuclear war—as indeed on the earlier occasion of the Bay of Pigs—the Congress took no part whatever in the shaping of American policy.

The Dominican intervention of April 1965 was decided upon what a comparable lack of Congressional consultation. Again, the leadership were summoned to the White House, on the afternoon of April 28, 1965, and told that the Marines would be landed in Santo Domingo that night for the express purpose of protecting the lives of American citizens. No one expressed disapproval. Had I known that the real purpose of our intervention was the defeat of the Dominican revolution, as subsequently became clear in the course of extensive hearings before the Senate Foreign Relations Committee, I would most certainly have objected to massive American military intervention.

When, in the wake of the Dominican hearings, I publicly stated my criticisms of American policy, there followed a debate not on the substances of my criticisms but on the appropriateness of my having made them. The question therefore became one of the proper extent and the proper limits on public discussion of controversial matters of foreign policy. The word "consensus" was then in vogue and so extensive had its influence become that there seemed at the time to be a general conviction that any fundamental criticism of American foreign policy was irresponsible if not actually unpatriotic. This was the first of many occasions on which no one questioned the right of dissent but many people had something to say about special circumstances making its use inappropriate. No one, it seems, ever questions the *right* of dissent; it is the *use* of it that is objected to.

I tried at the time of Dominican controversy to formulate my thoughts on Senatorial responsibility in foreign policy. I recall them here not for purposes of reviving the discussion of those unhappy events but in the hope of contributing to the work of this Subcommittee. I expressed these thoughts in a letter to President Johnson, dated September 16, 1965, and accompanying the speech on the Dominican Republic which I made that day. The letter read in part:

"DEAR MR. PRESIDENT: Enclosed is a copy of a speech that I plan to make in the Senate regarding the crisis in the Dominican Republic. As you know, my Committee has held extensive hearings on the Dominican matter; this speech contains my personal comments and conclusions on the information which was brought forth in the hearings.

"As you will note, I believe that important mistakes were made. I further believe that a public discussion of recent events in the Dominican Republic, even though it brings forth viewpoints which are critical of actions taken by your Administration, will be of long-term benefit in correcting past errors, helping to prevent their repetition in the future, and thereby advancing the broader purposes of your policy in Latin America. It is in the hope of assisting you toward these ends, and for this reason only that I have prepared my remarks.

"Public—and, I trust, constructive—criticism is one of the services that a Senator is uniquely able to perform. There are many things that members of your Administration, for quite proper reasons of consistency and organization, cannot say, even though it is in the long term interests of the Administration that they be said. A Senator, as you well know, is under no such restriction. It is in the sincere hope of assisting your Administration in this way, and of advancing the objectives of your policy in Latin America, that I offer the enclosed remarks."

I developed these thoughts further in a speech in the Senate on October 22, 1965. It read in part:

"... I believe that the chairman of the Committee on Foreign Relations has a special obligation to offer the best advice he can on matters of foreign policy; it is an obligation, I believe, which is inherent in the chairmanship, which takes precedence over party loyalty, and which has nothing to do with whether the chairman's views are solicited or desired by people in the executive branch.

"... I am not impressed with suggestions that I had no right to speak as I did on Santo Domingo. The real question, it seems to me is whether I had the right not to speak."

Mark Twain said the same thing in plainer words: "It were not best that we should all think alike; it is difference of opinion that makes horseshoes."

There are some fundamental and disturbing questions about the way in which we endure controversy in this country and they go to the heart of the constitutional matters which the Subcommittee is considering. No one objects to a little controversy around the edges of things to quibblings over detail or to hollow mountings about morality and purpose provided they are hollow enough. It is when the controversy gets down to the essence of things to basic values and specifies major actions to questions of whether our society is healthy or sick fulfilling its promise or falling short that our endurance is severely taxed.

Alexis de Tocqueville wrote: "I know of no country in which there is so little independence of mind and real freedom of discussion as in America. Profound changes have occurred since democracy in America first appeared and yet it may be asked whether recognition of the right of dissent has gained substantially in practice as well as in theory" And as to democracy in general he wrote "... The smallest approach irritates its sensibility and the slightest joke that has any foundation in truth renders it indignant; from the forms of its language up to the solid virtues of its character everything must be made the subject of encomium No writer whatever be his eminence can escape paying his tribute of adulation to his fellow citizens"¹ [Footnotes at end of exhibit].

Until and unless we overcome the disability of intolerance our democratic processes cannot function in full vigor and as they were intended to function by the framers of the Constitution. The vitality of advice and consent in the Senate is more than a matter of executive-legislative relations. It has to do with our national character and our national attitudes with our tolerance of deep unorthodoxy as well as of normal dissent, with our attitudes toward the protests of students as well as the criticisms of Senators.

IV. RESOLUTIONS AND "CONSULTATIONS"

As I said at the beginning of my statement, two new devices have been invented—more accurately, two old devices have been put to a new use—for the purpose of creating an appearance of Congressional consultation where the substance of it is lacking. I refer to the joint resolution and the Congressional briefing session. Arranged in haste, almost always under the spur of some real or putative emergency, these resolutions and White House briefings serve to hit the Congress when it is down, getting it to sign on the dotted line at exactly the moment when, for reasons of politics or patriotism, it feels it can hardly refuse.

The Gulf of Tonkin resolution, so often cited as an unqualified Congressional endorsement of the war in Vietnam, was adopted on August 7, 1964, only two days after an urgent request from the President. It was adopted after only perfunctory committee hearings and a brief debate with only two Senators dissenting. It was a blank check indeed, authorizing the President to "take all necessary steps including the use of armed force" against whatever he might judge to constitute aggression in southeast Asia.

The error of those of us who piloted this resolution through the Senate with such undeliberate speed was in making a personal judgment when we should have made an institutional judgment. Figuratively speaking, we did not deal with the resolution in terms of what it said and in terms of the power it would vest in the Presidency; we dealt with it in terms of how we thought it would be used by the man who occupied the Presidency. Our judgment turned out to be wrong, but even if it had been right, even if the Administration had applied the resolution in the way we then thought it would, the abridgment of the legislative process and our consent to so sweeping a grant of power was

not only a mistake but a failure of responsibility on the part of the Congress. Had we debated the matter for a few days or even a week or two, the resolution most probably would have been adopted with as many or almost as many votes as it actually got, but there would have been a legislative history to which those of us who disagree with the use to which the resolution has been put could now repair. The fundamental mistake, however, was in the giving away of that which was not ours to give. The war power is vested by the Constitution in the Congress, and if it is to be transferred to the executive, the transfer can be legitimately effected only by constitutional amendment, not by inadvertency of Congress.

The Congress has lost the power to declare war as it was written into the Constitution. It has not been so much usurped as given away, and it is by no means certain that it will soon be recovered. On February 15, 1848, Abraham Lincoln, then a Member of the House of Representatives, wrote a letter to a man called William H. Herndon, contesting the latter's view that President Polk had been justified in invading Mexico on his own authority because the Mexicans had begun the hostilities. "Allow the President to invade a neighboring nation," wrote Lincoln, "whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect after you have given him so much as you propose."

The Senate, I believe, is becoming aware of the dangers involved in joint resolutions such as the Gulf of Tonkin resolution and earlier resolutions pertaining to Taiwan, Cuba and the Middle East. This awareness was demonstrated by the Senate's refusal to adopt the sweeping resolution pertaining to Latin America requested by the Administration shortly before the meeting of the American presidents at Punta del Este last April. That resolution, which would have committed the Congress in advance to the appropriation of larger new sums of money for the Alliance for Progress, was neither urgent nor necessary, it was indeed no more than a convenience and a bargaining lever for the Administration. Its rejection had nothing to do with the Latin American policy of the United States; indeed, it was not the substance of the resolution but the unusual procedure which caused many of us to oppose it. Still less was the rejection of the resolution a matter of "pique" or "frustration," as was alleged by members of the Administration. It was rather a tentative assertion by the Senate that it has come to be doubtful about the granting of blank checks. I hope that it foreshadows further demonstrations on the part of the Congress of a healthy skepticism about hasty responses to contrived emergencies. I hope that it foreshadows a resurrection of continuing debate and of normal deliberative processes in the Senate.

No less defective than the joint resolution as a means of Congressional consultation is the hastily arranged "consultation"—really a briefing—either in committee or at the White House. There is indeed a psychological barrier to effective consultation on the President's own ground. The President is, after all, chief of state as well as head of government and must be treated with the deference and respect due him as chief of state as well as head of government and must be treated with the deference and respect due him as chief of state. One does not contradict kings in their palaces or Presidents in the White House with the freedom and facility with which one contradicts the king's ministers in parliament or the President's cabinet members in committee. That indeed is the value and purpose of our Congressional committee system. It permits us to communicate candidly with the President as political leader without becoming entangled in the complications or protocol which surrounds his person. I conclude, therefore, that any meaningful consultation with the Congress must take place on the Congress's own ground, with representatives of the President who can be spoken to in candor and who will speak to us in candor.

They do not always do that, and that is the next problem I would cite. Again and again, representatives of the executive have come before the Foreign Relations Committee to tell us in closed session what we have already read in our morning newspaper. Again and again, they have come not to consult with us but to brief us, to tell us what they propose to do or to try to put a good face on something they have already done. One recent witness devoted a large part of his presentation to an endorsement of the idea of consultation

without ever getting around to any actual consulting. At a recent meeting on the Middle Eastern crisis the Administration's witness was unwilling to answer either yes or no to the question of whether he was prepared to assure the Committee that the President would not take the United States into war in the Middle East without the consent of Congress.

Meaningful consultation would consist first of a presentation of provisional views on the part of the Administration and then of a presentation of the views of the members of the Committee, with the Administration witness performing the extremely important function in the second phase of *listening*—listening with an open mind and with an active regard for the fact that, however little he may like it, the men he is listening to are representatives of the people who share with the executive the constitutional responsibility for the making of American foreign policy.

The problem is one of attitudes rather than of formal procedures. The critical question is not whether State Department officials dutifully report Administration acts to Congressional committees or telephone interested Senators to tell them that American planes are *en route* to the Congo. The question is whether they respond to Congressional directives and recommendations by asking themselves "How can we get around these?" or by asking themselves "How can we carry them out?". The latter, to be sure, can be awkward and irksome of the executive, but that is the kind of system we have. As the political scientists Edward S. Corwin has written: "The verdict of history in short is that the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually to the President, though by no means always."² Our legitimate options are to comply with the system or to revise it by the means spelled out in the Constitution but not to circumvent it or subvert it.

"Consultations" which are really only briefings, and resolutions like the Tonkin Gulf resolution, represent no more than a ceremonial role for the Congress. Their purpose is not to elicit the views of Congress but to avoid controversy of the kind President Truman experienced over the Korean War. They are devices therefore not of Congressional consultation but of executive convenience. Insofar as the Congress accepts them as a substitute for real participation, it is an accomplice to a process of illicit constitutional revision.

Some political scientists do not even pretend that there is a role for Congress in the making of foreign policy in the nuclear age. They argue that the authority to declare war has become obsolete and that checks and balances are now provided by diversities of opinion within the executive branch. "This," in the words of the American diplomatic historian Ruhl Bartlett, "is an argument scarcely worthy of small boys, for the issue is not one advice or influence. It is a question of power, the authority to say that something shall or shall not be done. If the president is restrained only by those whom he appoints and who hold their positions at his pleasure. There is no check at all. What has happened to all intents and purposes, although not in form and words, is the assumption by all recent presidents that their constitutional right to *conduct* foreign relations and to advise the Congress with respect to foreign policy shall be interpreted as the right to control foreign relations."³

V. TREATIES AND COMMENTS

So widespread are American commitments in the world, and so divers are the methods and sources which are said to make for a commitment, that a great deal of confusion has arisen as to what is required to make a formal commitment to a foreign country. Does it require a treaty ratified with the consent of the Senate? or can it be accomplished by executive agreements? or by simple Presidential declaration? or by a declaration or even a statement made in a press conference by the Secretary of State? The prevailing view seems to be that one is as good as another, that a clause in the transcript of a press conference held by Secretary Dulles in 1957 is as binding on the American Government today as a treaty ratified by the Senate.

If treaties are no more than one of the available means by which the United States can be committed to military action abroad, as Secretary Rusk believes, if the executive is at liberty to commit American military forces abroad in the absence of a treaty obligation as in the case of Vietnam, or in violation of a treaty obligation as in the case of the Dominican Republic, why do we bother

with treaties at all? As things now stand, their principal use seems to be the lending of an unusual aura of dignity or solemnity to certain engagements such as the test ban treaty and the outer space treaty.

In addition to the general denigration of treaties, there has developed a widespread attitude, at least on the part of what might be called the foreign policy "establishment," that it is improper for the Senate to reject treaties or attach reservations to them once they have been negotiated. The power of the Senate to accept, reject or amend treaties is of course acknowledged, but it is regarded not as a legitimate function but as a kind of naked power the use of which under any circumstances would be irresponsible. There seems to be a kind of historical memory at work here; Versailles, like Munich, has conveyed more lessons than were in it.

There appeared in the *New York Times* on March 10, 1967, an interesting and significant editorial commenting on questions that were then being raised in the Senate about the Soviet consular treaty and the outer space treaty. The *Times* commented as follows:

"A treaty is a contract negotiated by the executive branch with the government of one or more other countries. In the process there is normally hard bargaining and the final result usually represents a compromise in which everyone has made concessions. Thus when the Senate adds amendments or reservations to a treaty, it is unilaterally changing the terms of a settled bargain. The practical effect of such action is really to reopen the negotiations and force the other party or parties to re-examine their previously offered approval.

"Every time the Senate exercises this privilege it necessarily casts doubt upon the credibility of the President and his representatives and weakens the bargaining power of the United States to the international arena. The Senate power to do this is unquestioned, but it is equally unquestionable that this power is best used only to express the gravest of concerns, especially in a period of crisis such as is posed by the Vietnam war and efforts to end it."

My attention was arrested by the assertion that a treaty, once negotiated by the executive was a "settled bargain." I had supposed that under our Constitution a treaty was only a *tentative* bargain until ratified with the consent of the Senate.

Returning to my earlier point, the recent crisis in the Middle East reveals the prevailing confusion as to what constitutes a binding obligation on the United States.

In the days preceding the recent Arab-Israeli war there was a good deal of discussion of American responsibilities in the Middle East marked by a prevailing assumption that the United States was "committed" to defend Israel against any act of aggression. As a signatory to the United Nations Charter, which incidentally was ratified by the Senate as a treaty, the United States is indeed obligated to support any action which the United Nations might take in defense of a victim of aggression. The cited sources of the alleged American "commitment," however, were not the United Nations Charter but a series of policy statements, including President Truman's declaration of support for the independence of Israel in 1948, the Anglo-French-American Tripartite Declaration of 1950 pledging opposition to the violation of frontiers or armistice lines by any Middle Eastern state, a statement by President Eisenhower in January 1957 pledging American support for the integrity and independence of Middle Eastern nations, a statement by Secretary of State Dulles in February 1957 stating that the United States regarded the Gulf of Aqaba as an international waterway, a press conference statement in March of 1963 by President Kennedy pledging American opposition to any act of aggression in the Middle East, and a reiteration by President Johnson in February 1964 as American support for the territorial integrity and political independence of all Middle Eastern countries.

The foregoing are all *statements of policy*, not binding commitments in the sense that a treaty ratified by the Senate is a binding commitment. If they are binding and if they were interpreted as requiring the United States to take unilateral action to maintain the territorial integrity of all Middle Eastern states, we would now be obligated forcibly to require Israel to restore all of the territory which she has seized from her Arab neighbors. We are, however, not so obligated. Our only binding commitment in the Middle East is our obligation

to support and help implement any action that might be taken by the United Nations. In the absence of such action, we are not bound, not, that is, unless statements in Presidential press conferences are as binding upon the United States as treaties ratified by the Senate.

VI. RESTORING CONGRESSIONAL PREROGATIVE

The Foreign Relations Committee has been experimenting in the last two years with methods which it is hoped will help restore the Senate to a significant and responsible role in the making of American foreign policy. Principally, the Committee has made itself available as a public forum for the airing of informed and diverse opinion on both general and specific aspects of American foreign policy. We have invited distinguished professors, scholars, diplomats and military men to talk with the Committee on a wide variety of matters, including the Vietnamese war, American policy toward China, American relations with its European allies, American relations with the Soviet Union and Eastern Europe, and even certain experimental subjects such as the psychological aspect of international relations. In the spring of 1967 the Committee heard testimony by such distinguished persons as George Kennan, Edwin O. Reischauer and Harrison Salisbury in a series of hearings on the "responsibilities of the United States as a global power."

It is by no means clear that public hearings of the kind which have been held in these last two years will prove to be a viable and effective means of bringing Congressional influence to bear on the making of foreign policy. The hearings have been, I emphasize, experimental. They do, however, suggest the possibility of a reinvigorated Senate participating actively and responsibly in the shaping of American foreign policy, in the articulation of the values in which we would have our foreign policy rooted and the purposes which we would have it serve.

I am reasonably confident that the Senate Foreign Relations Committee, by making itself available as a forum of free and wide-ranging discussion, can serve valuable democratic purposes: it can diminish the danger of an irretrievable mistake; it can reduce the likelihood of past mistakes being repeated; it can influence policy both current and future; it can make a case for history and defend America's good name; it can help to expose old myths in the light of new realities; it can provide an institutional forum for dissenters whose dissent might otherwise be disorderly; and, by continuing discussion of crises like the war in Vietnam, it may help us shape the attitudes and insights to avoid another such tragedy in the future.

Free and open discussion has another function, more difficult to define. It is therapy and catharsis for those who are dismayed; it helps the reassert traditional values and to clear the air when it is full of tension. A man must at times protest, not for politics or profit but simply because his sense of decency is offended, because something goes against the grain.

On the Senate floor as well as in the Foreign Relations Committee, vigorous and responsible discussion of our foreign relations is essential both to the shaping of a wise foreign policy and to the sustenance of our constitutional system. The criteria of responsible and constructive debate are restraint in matters of detail and the day-to-day conduct of foreign policy, combined with diligence and energy in discussing the values, direction and purposes of American foreign policy. Just as it is an excess of democracy when Congress is overly aggressive in attempting to supervise the conduct of policy, it is a failure of democracy when it fails to participate actively in determining policy objectives and in the making of significant decisions.

A Senator has the obligation to defend the Senate as an institution by upholding its traditions and prerogatives. A Senator must never forget the Presidency when he is dealing with the President and he must never forget the Senate when he is talking as a Senator. A Senator is not at perfect liberty to think and act as an individual human being; a large part of what he says and what he does must be institutional in nature. Whoever may be President, whatever his policies, however great, the confidence they may inspire, it is part of the constitutional trust of a Senator to defend and exercise the advice and consent function of the Senate. It is not his to give away.

Mr. RUSSELL. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield to the Senator from Georgia.

Mr. RUSSELL. Mr. President, may I say to the distinguished Senator from Arkansas that I think he has rendered a real service in offering this resolution. I hope he will hold hearings on it.

I know of nothing that is more in need of clarification than the present state of the alleged commitment of the United States all over the world. We hear that national commitment has been made because two Presidents have made speeches outlining this policy, or perhaps two Secretaries of State, or one Vice President; or maybe they all joined in and made speeches, and that that constitutes national commitment. The commitment in many instances is one that can only be met by the blood of the young men of this Nation and the treasure of the people of this country that is collected through taxes.

As I understand it, the Senator says that the resolution does not and, indeed, cannot seek to limit the powers of the President as Commander in Chief of the Armed Forces of the United States. That is a matter outlined in the Constitution. However, there is so much loose talk of the national commitment we have, if the Senator's committee could bring to light those we consider viable and those that might be barred by the statute of limitations, or for some other reason, it would be a great service to the Congress and the Nation.

Mr. FULBRIGHT. I do intend to ask the Foreign Relations Committee to hold hearings on this subject at an early date and to try to develop clearly how these commitments came about. Often we have no treaties for what are claimed to be our commitments, and there are many things which are not clear.

Mr. SYMINGTON. Mr. President, will the Senator yield to me?

Mr. FULBRIGHT. I yield.

Mr. SYMINGTON. Mr. President, I am impressed with the statement of the chairman of the Committee on Foreign Relations: And also with this resolution. I am glad to note, also that the chairman of the Armed Services Committee, the Senator from Georgia [Mr. RUSSELL], is in full agreement with the resolution, especially in that it would appear one of the most important presentations before this body since I have had the privilege of being a Member.

It is my recollection that one of the fine minds of this country, the former Secretary of State, Dean Acheson, recently wrote in one of his books that the greatest single change in the functioning of our Government was further delegation by the legislative branch of its constitutional authority to the executive branch.

As we all know, Dean Acheson is a thinker. He was an outstanding statesman. It would seem, therefore, that this resolution, prepared by two of the fine minds of the Senate is a practical effort to slow that trend.

Based on my experience as a member of the Committee on Foreign Relations, and also Armed Services, I am glad to see that both chairmen of these two committees, the way the world is today, are in full agreement with respect to the importance of this resolution.

I thank my friend for yielding.

Mr. FULBRIGHT. I am happy now to yield to the Senator from North Carolina, and then I will be glad to yield to my colleague [Mr. McCLELLAN].

Mr. ERVIN. Mr. President, I want to commend the able Senator from Arkansas on the presentation of this resolution. It seems to me that it compels the Senate to study anew one of the most important problems which now confronts the American people and which has confronted them for many years.

The Senate has recently manifested an interest in a restudy of the fundamental system of our Constitution which we call the separation of powers. Its interest in this field is shown by the fact that during the last session it created a special subcommittee of the Committee on the Judiciary; namely, the Subcommittee on the Separation of Governmental Powers.

Mr. FULBRIGHT. If the Senator from North Carolina will allow me to interject a comment; he is the distinguished head of that subcommittee and it was in the preparation of my remarks before that subcommittee and consideration of this issue in Congress that the idea of my resolution was generated. It grows out of the work the Senator's subcommittee is engaged in.

Mr. ERVIN. I should like to say for the benefit of all Senators, and the public generally, that the Senator from Arkansas [Mr. FULBRIGHT] appeared before the Subcommittee on the Separation of Governmental Powers some days ago and made one of the most penetrating and illuminating statements I have ever heard on the subject of the power to conduct our foreign policy. The Sen-

ator has offered to have the statement placed in the RECORD today and it merits thoughtful consideration by all Senators and the American people who are interested in constitutional government and the position in which we may find ourselves in this precarious world, now and in the future.

The Senator from Arkansas demonstrates in his statement on this occasion, and also in the statement he made before the Subcommittee on the Separation of Government Powers, that the making of foreign policy is not a prerogative which is committed solely to the executive branch of Government; that, on the contrary, it is a power which the executive branch shares with Congress in general, and the Senate in particular.

The Senator from Arkansas has rendered a real, a lasting, and a most significant service to the country in proposing the resolution which he has offered today, because it presents an opportunity for us to study again the fundamental principles of the separation of powers and the combination of powers and also to relearn something which all too often we may have forgotten; namely, that the direction of American foreign policy is a matter which belongs to Congress in general, and the Senate in particular, as well as to the President. It is a power which must be exercised in conformity with the Constitution. I believe in conformity with practical wisdom in this precarious world and that this power must be shared between the executive and legislative branches of Government.

I thank the Senator for yielding to me.

Mr. FULBRIGHT. I thank the Senator from North Carolina for his statement. I feel this resolution and the hearings we will have upon it complement the basic and major work which the Senator from North Carolina is doing. The resolution focuses on only one aspect of this over-all problem.

Now I am happy to yield to my colleague from Arkansas.

Mr. McCLELLAN. I thank my colleague for yielding to me. I join with Senators here who have commended the Senator for his presentation of the resolution.

So far as I know now, I am inclined to give it my strong support, but I want to ask one or two questions to see if I can clarify what the objectives of the resolution are.

In the first place, may I ask whether the Committee on Foreign Relations has available to it now, from any source, inventory, or listing, the different commitments—using the term somewhat loosely as I think it is today applied—all over the world, commitments of human as well as material resources. Does the Foreign Relations Committee have any information available to it today so that it could advise the Senate where the commitments are and their extent?

Mr. FULBRIGHT. If the word "commitments" is used a little more narrowly to mean those obligations arising out of treaties or conventions in which Congress has played a part, they are certainly available.

Mr. McCLELLAN. I am talking about obligations which are not in treaty form. In treaty form we do not need any inquiry.

Mr. FULBRIGHT. If I may say to the Senator, there are a number of obligations which have been referred to, certainly, by members of the executive branch, as commitments. But I do not think they are commitments. This is the crux of the matter. The hearings I expect to hold will be intended to develop the distinction between what are valid national commitments, or true commitments in the constitutional sense, and what are simply statements of policy that may have been made by individual officials, say, at the Honolulu conference or at any other meeting of that kind. These, I do not believe, under the Constitution, could be held to the true commitments of this country. They are merely statements of intention on the part of members of the executive branch, usually the Vice President, the Secretary of State, or the President.

I certainly hope that the hearings will draw this distinction between a true commitment in which the honor of our country is involved and a simple statement of policy which is, in a sense, a statement of intention on something which may happen at a later date, which with the cooperation of Congress and its approval might then create a commitment. But, when we get into this latter field, we have all degrees of incipient commitments. Perhaps the statement made at Honolulu with regard to the so-called Asian or Johnson doctrine is the beginning of a commitment. If we do not do something about it, if we do not try and clarify and restrict it, we may find that it is soon viewed as a com-

mitment—that is one of the principal points. I have in mind. I would not call such a statement a commitment yet. But if we do not do anything and allow it to be reiterated time and again that it is a commitment, the first thing we know, it will be accepted at a national commitment without congressional consent.

Mr. McCLELLAN. In other words, by silence, by inaction, we acquiesce in it.

Mr. FULBRIGHT. That is correct.

Mr. McCLELLAN. And therefore it becomes a commitment, and we let the world believe that we are officially committed.

Mr. FULBRIGHT. I am not talking only about this administration. Going back to the days of Truman administration on through the Eisenhower administration on through the Eisenhower administration, there are instances—which I shall cite a little later—in which a statement was made in a conference, or even in a press conference, and now, 10 years later, it is referred to as our commitment.

Mr. McCLELLAN. Is there any source now where the information is available to the Senator's committee or to the Congress containing such commitments, even though we may term them as loose commitments, which can be identified for our guidance?

Mr. FULBRIGHT. We have a great deal of information but one cannot be sure; members of the executive may consider even some press conference statements as commitments, which I do not. The staff has done some work on this subject already. I will refer to some instances later.

I am not trying to be evasive. This is a question of definition. We clearly have commitments in some instances where legislation was involved. But there is a gradation. I would dispute some as being commitments. They were simply statements. While I know about some of them, there may be others that I do not know about. I think we can put them together.

Mr. McCLELLAN. The point I am making is, if today we asked for that information, from what source would we ask it, and would it be available to us?

Mr. FULBRIGHT. I think so, but with that reservation as to what is a commitment. Some of those statements would be so vague that I would not include them in the list, but I think they are available.

Mr. McCLELLAN. The committee will hold hearings and I suppose it will provide a study as to what is needed. I would hope and would assume that one of the objectives would be as follows. I give this as an illustration. Of course, a commitment of human resources is far more serious, but let us assume someone goes to a country and makes a speech that we pledge all sorts of things. That may be a commitment of one branch of the Government, but is that a commitment that is binding on the Government without the advice and consent of the Senate?

Mr. FULBRIGHT. I do not think so, unless it is in pursuance of a treaty. I assume, from the illustration, it is not. That is one of the things we plan to clarify for the future.

Mr. McCLELLAN. I commend the Senator, because I think this is an area where all of us get confused. At times, I am at a loss to know what I should do or what our obligation is. There may be some actions of which we may not have approved, but if the Government is committed, we want to follow it and uphold its hand. That is a problem we have in our so-called foreign relations and international affairs. I hope the Senator's committee can study it and help to clarify it.

Mr. FULBRIGHT. We will try to do that.

Mr. YOUNG of North Dakota. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield to the Senator from North Dakota.

Mr. YOUNG of North Dakota. Mr. President, I want to commend the distinguished Senator from Arkansas, the chairman of the Foreign Relations Committee, for a resolution which will have more far-reaching consequences and important consequences than anything that will probably be considered in this session of Congress.

Starting after World War II, we seem to have embarked on an entirely new foreign policy. The executive department took over almost completely the handling of foreign policies and commitments. These commitments are so huge now that I do not think any Member of the Senate really knows what all we are committed to. The dangerous part of it is that the commitments are far beyond our capabilities. We are just not big enough or powerful enough and

we do not have the manpower or financial resources to police the whole world, which we are attempting to do now. We are now engaging in large-scale warfare without a declaration of war. Many people do not know why we are doing it. I receive many letters from constituents who say, "Why don't you do something about all our foreign commitments?" In recent years it is difficult to answer, because the executive department has taken most of the authority of Congress in this field.

I commend the Senator for trying to get back to the Congress some of the powers that rightfully belong to it.

Mr. FULBRIGHT. I thank the Senator for his comments. I hope the hearings will clarify the situation.

Mr. MORTON. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield to the Senator from Kentucky.

Mr. MORTON. I commend the chairman of the Foreign Relations Committee. I think a resolution of this kind, coming from one who has had the experience he has had in this general area and in his position of leadership in the Senate, will be considered in great detail. I was impressed by a comment which the Senator made as follows:

We in government life frequently err by refusing to define our terms and by falling back on clichés which really have not been examined in years. In the field of foreign policy certain phrases reasonably descriptive of the world situation, two decades ago are being used almost ritualistically without reappraisal of their relevance to current conditions—

And so forth.

This is a point that I think needs some emphasis. Today, in the technological age in which we find ourselves, with the tremendous revolution in transportation, communication, and everything else that has taken place in a quarter of a century, obviously some statement that some President or Secretary of State made 25 years ago may not fit the needs of today.

I do not know whether the Congress ever took any action upon the Monroe Doctrine, whose genesis was the fact that the Russians were looking at the west coast of South America and this continent with some degree of interest. Here today we have a situation in one of our Latin American neighbors, Cuba, in which she is exporting revolution to our friends in Latin America. This brings on an entirely different situation. Yet, are we going to be hidebound and say we are committed to protecting Cuba against any enemy whomsoever? This is one example—extreme, it is true.

The General Assembly of the United Nations had 45 members at its inception just some 22 years ago. Today it has more than doubled. Did the people who drew up the United Nations Charter or Treaty envisage the fact that it would go up by 120 percent in membership; that the whole continent of Africa, then for the most part colonial, would have a multiplicity of free, young governments, with all their problems; that south Asia would no longer be colonial, but would be in the status in which we find it today?

Referring briefly to the Senator's colloquy with his senior colleague as to what is a commitment, I do not know, but I know that in my short time here I have been importuned by both Democratic and Republican administrations with, "Well, whether you like it or not, we have got to do it. We are committed. We said we are going to do it." So it comes about after "church is out," really. What can we do but acquiesce in it, in the way it is presented to us—"the honor of the United States is involved here"?

I commend the Senator from Arkansas. I know he will have productive hearings on this matter.

I agree with his comment of the great work being done by the senior Senator from North Carolina [Mr. ERVIN], because I think this problem goes beyond the foreign field. The Senator from Arkansas has restricted this resolution to this particular area, the need for which to me is so abundantly clear that we will act on it soon.

Mr. FULBRIGHT. I thank the Senator for his comments.

Mr. MORSE. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield to the Senator from Oregon.

Mr. MORSE. I rise to commend the Senator from Arkansas and highly pledge my support of the resolution. I also join in the commendation of the Senator from North Carolina [Mr. ERVIN] for the great work he is doing in conducting the hearings on the important issue of constitutional law involving the separation of powers doctrine.

I testified before his committee, as did the Senator from Arkansas. Senator ERVIN told me, a minute or two ago, that he inserted my testimony in the CONGRESSIONAL RECORD today. My testimony was limited for the most part to the major thrust of the objective of the resolution which the Senator from Arkansas has submitted today. To me it means that, at long last, some action is being taken in the Senate of the United States to exercise its constitutional duties and protect its constitutional prerogatives.

The Senator from Arkansas and other Senators have heard me, for many years, deplore what I consider to be the surrender of the constitutional prerogatives and the constitutional duties of the U.S. Senate in this area of separation of powers. In the field of constitutionalism, I have always been ultraconservative, because one cannot be anything else, in my judgment, and carry out the constitutional responsibilities of a Senator.

What we have permitted to happen, by way of de facto action, is for the executive branch of the Government to amend the Constitution of the United States by violations of its constitutional responsibilities. Nobody is to blame for that but Congress, particularly the Senate. If we want government by men instead of government by constitutional law, the way to get it is to do what the Senate has done for many, many years. To try to get the Senate to stop doing it has been a challenge that has confronted some of us.

When we have voted against a Formosa resolution, when we have voted against a Middle East resolution, when we have voted against a Tonkin Bay resolution, when we have refused to give to a President of the United States unchecked power, the Senate knows what has descended upon our political heads. But all we have been doing is pleading for the following of the check and balance system of the Constitution.

If the Senator from Arkansas will permit me, I should like to read a few paragraphs from one of the greatest constitutional lawyers who has sat in this body since I have been a Member—a constitutional lawyer whom I followed, when he was in the Senate, on the major positions he took on constitutional law.

Over the weekend, I read again a little book published by Senator Robert A. Taft in 1951, entitled "A Foreign Policy for Americans."

He, interestingly enough, throughout his great record in the Senate, took exactly the same position the Senator from Arkansas is taking in this resolution. He took exactly the same position I have argued for here on the floor of the Senate time and time again and which I taught in the law school classroom before I came to the Senate. I would have the RECORD show some of the very sound constitutional law teachings of the late Senator Taft as they relate directly and indirectly to the resolution of the Senator from Arkansas. If the Senator will permit me, I ask the Senate to listen to some of his paragraphs.

MR. FULBRIGHT. I am happy to yield for that purpose.

MR. MORSE. I think it is a very fitting supplement to the Senator's argument in support of the resolution. I speak only for myself and make my own interpretation of what Senator Taft wrote. But make your own. Answer, if you can, his statement quoted on page 22:

"I think it is fair to say that the State Department has adopted an attitude of hostility toward Congress and an unwillingness to submit any matter to Congress if it thinks it can possibly carry it through without such submission. It shows a complete distrust of the opinion of the people, unless carefully nursed by State Department propaganda."

In that passage Senator Taft was talking about secret diplomacy. He was talking about those "commitments" to which the Senator from Arkansas refers in his resolution. The Senator from Arkansas has sat with me in meetings of the Committee on Foreign Relations when State Department representatives have come before the committee and said, "You can't let us down now. It was so hard to negotiate this commitment, it was so difficult to get them to agree. Now, if you let us down and do not go along with this commitment, you are going to do great injury to American diplomacy."

Let me say I believe great restrictions should be placed on the street diplomacy of the State Department. The secret diplomacy of the State Department violates the cardinal principle of making available to the people the facts that involve their lives in the field of foreign policy. It conceals from them knowledge to which the public is entitled. That, in part, I respectfully submit, is what is behind the resolution of the Senator from Arkansas.

Listen to what else the great Senator from Ohio said:

In the long run, the question which the country must decide involves vitally not only the freedom of the people of the United States but the peace of the people of the United States. More and more, as the world grows smaller, we are involved in problems of foreign policy. If in the great field of foreign policy the President has the arbitrary and unlimited powers he now claims, then there is an end to freedom in the United States not only in the foreign field but in the great realm of domestic activity which necessarily follows any foreign commitments. The area of freedom at home becomes very circumscribed indeed."

We see it now vis-a-vis Vietnam, may I say by way of digression.

Returning to the words of Senator Taft:

"If the President has unlimited power to involve us in war, then I believe that the consensus of opinion is that war is more likely. History shows that when the people have the opportunity to speak they as a rule decide for peace if possible."

That is why the senior Senator from Oregon, for more than 3½ years, has dared to challenge this administration time and time again to send up to the Congress a war message. We all know why they do not. They do not dare to. We do not dare declare war, because the world would leave us.

Mr. FULBRIGHT. They have already left, most of them.

Mr. MORSE. The Senator from Arkansas is completely right in that observation. Senator Taft was quite right when, in this book of his, he pointed out that people can be counted upon to support peace. That is why I have argued against our undeclared war in Vietnam. That is why I have argued it is an unconstitutional war. It violates article I, section 8, of the Constitution which puts the vote power to declare war in the Congress and not in the President.

Taft continues:

It shows that arbitrary rulers are more inclined to favor war than are the people at any time. This question has become of tremendous importance, perhaps greater than any particular problem of troops to Europe or the manner in which the Korean war shall be conducted.

Then on page 24 he states:

Furthermore, a document was submitted to Congress, entitled *Powers of the President to Send the Armed Forces Outside the United States*, dated February 28, 1951, which was printed, though not endorsed, by the Joint Committees on Foreign Relations and Armed Services of the Senate. This document contains the most unbridled claims for the authority of the President that I have ever seen written in cold print. In effect, the document asserts that whenever in his opinion American foreign policy requires he may send troops to any point whatsoever in the world, no matter what the war in which the action may involve us. The document also claims that in sending armed forces to carry out a treaty the President does not require any statutory authority whatever, and it does not recognize the difference between a self-executing treaty and one which requires, even by its own terms, congressional authority. It ends with the most sweeping claims for power:

"As this discussion of the respective powers of the President and the Congress in this field has made clear, constitutional doctrine has been largely molded by practical necessities. Use of the Congressional power to declare war, for example, has fallen into abeyance because wars are no longer declared in advance."

Let me say that the Senate cannot amend the Constitution of the United States by failing to follow its clauses. The Congress cannot amend the Constitution of the United States by nonobservance of its mandates. The requirement stays there as a matter of constitutional right of the American people. The requirement under article I, section 8, is there today even though both the President and the Congress have ignored it. Congress cannot destroy it, may I say, by ignoring it.

Senator Taft, quoting further from the document referred to, goes on to point out:

"The Constitutional power of the Commander in Chief has been exercised more often, because the need for armed international action has grown more acute. The long delays occasioned by the slowness of communications in the eighteenth century have given place to breathtaking rapidity in the tempo of history. Repelling aggression in Korea or Europe cannot wait upon Congress-

sional debate. However, while the need for speed and the growth in the size and complexity of the armed forces have enlarged the area in which the powers of the Commander in Chief are to be wielded, the magnitude of present-day military operations and international policies requires a degree of Congressional support that was unnecessary in the days of the nineteenth century."

We turn now to Senator Taft's summation of this shocking doctrine. He says:

That seems a very gracious concession to Congress, Congress no longer has any power to act. It is simply given the right to support the President after the President has acted. I was shocked in the very beginning of this controversy by the speed with which blind partisans in the administration rushed to the defense of the proposition that the President can make war and warlike commitments. Senator Connally, the chairman of the Foreign Relations Committee, made the extraordinary assertion on the floor of the Senate:

"The scope of the authority of the President as Commander in Chief to send the Armed Forces to any place required by the security interests of the United States has often been questioned, but never denied by authoritative opinion."

Of course, the constitutional law books are full of the denial of that authority, and rightly so. As Taft says:

That certainly is a complete misrepresentation of the discussion of these constitutional powers which has taken place since the foundation of the nation.

He then states, on page 26:

Of course, the President has wide powers in foreign policy, but the framers of the Constitution provided expressly that only Congress could do certain things. Those powers are expressed in Section 8 of Article I.

The Senator documents his observation as follows:

Of course, Congress is given the power, and the exclusive power—

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

"To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

That reflects a certain and definite suspicion of a possible desire on the part of some President to set up a great permanent military force. Further powers of Congress as stated in Section 8:

"To provide and maintain a navy.

"To make rules for the government and regulation of the land and naval forces."

There are other powers, such as calling forth the militia and disciplining the militia.

The Constitution also provides that the President shall have the power to make treaties, but only by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur. The President's relationship to the armed forces is stated only in Section 2 of Article II of the Constitution:

"The President shall be Commander in Chief of the Army and Navy of the United States . . ."

There is no very definite limit—and I think it is admitted by every responsible authority who has discussed the problems—on the President's power to send troops abroad: he cannot send troops abroad if the sending of such troops amounts to the making of war. I think that has been frequently asserted; and whenever any broad statements have been made as to the President's power as Commander in Chief to send troops anywhere in the world the point has been made that it is always subject to that particular condition.

Perhaps no one has been quoted more on this general subject than has my father, who discussed this question in various lectures, articles, and books. My father has wide experience, as governor general of the Philippines, Secretary of War, and President of the United States. He never served in a legislative body, and, if anything, I think he leaned toward the power of the Executive. The clearest statement of the question, I believe, is contained in his article in the June 6, 1916, number of the Yale Law Journal, from which I quote:

"When we come to the power of the President as Commander in Chief, it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the Army to be moved from one part of the country to another. The power to declare war is given to Congress. . . . This is necessarily a limitation of the power of the President to order the

Army and the Navy to commit an act of war. It was charged against President Polk that he had carried on a foreign war against Mexico before Congress had authorized it or declared it, and it is difficult to escape the conclusion that the act of President Wilson in seizing Veracruz was an act of war without congressional authority, at the time it was committed, though a resolution authorizing it was pending, and had passed one House and was passed in a very short time after the act by the other House, constituting a valid ratification.

"It is not always easy to determine what is an act of war. The President has the authority to protect the lives of American citizens and their property with the Army and the Navy. This grows out of his control over our foreign relations and his duty to recognize as a binding law upon him the obligation of the Government to its own citizens. It might, however, be an act of war if committed in a country like England or Germany or France which would be unwilling to admit that it needed the assistance of another government to maintain its laws and protect foreign relations, but would insist that injuries of this sort must be remedied through diplomatic complaints and negotiations. . . . Of course, the President may so use the Army and Navy as to involve the country in actual war and force a declaration of war by Congress. Such a use of the Army and Navy, however, is a usurpation of power on his part. (Italics mine.)"

Some may feel that if the President can do certain things there is no sense in arguing that he has no right to do them. But the division and limitation of powers is the very basis of our constitutional system, and decisions regarding the proper limits of such powers affect the validity of many other actions, such as the right of Congress to pass legislation to restrain the President's authority to send troops abroad in such a way as to involve the country in war. True, the President perhaps cannot be prevented from usurping power, but we can only presume the President will follow constitutional laws passed by the people's representatives.

Most of the cases which have been cited as authority for the President sending troops abroad are cases where the use of our troops was limited to the protection of American citizens or of American property.

The Boxer Rebellion is frequently cited; but in that case troops were sent into China because the legations in Peking were besieged and the legitimate Chinese Government was unable to defend them against the rebellious Boxers. So the various nations sent their troops there, in order to rescue those who were in the legations. That was a clear effort to protect American lives, to protect American diplomatic lives which were threatened contrary to the law of nations; and certainly it was not an act which would necessarily involve us in war.

It is also interesting to note that Senator Taft called attention to Abraham Lincoln's opposition to the warmaking policies that President Polk followed in making war against Mexico. Many American historians and constitutional authorities have been highly critical of the involvement of the United States in a war with Mexico by President Polk.

Senator Taft, in commenting on the excessive use of Presidential power by President Polk, wrote as follows:

The case of the Mexican rebellion is referred to, and it was referred to by my father, who said that President Polk's right was challenged. It was challenged by a very distinguished American, Abraham Lincoln, who on February 15, 1848, wrote his law partner with reference to Polk's use of the Army against Mexico:

"Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such purposes, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect. If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him 'I see no probability of the British invading us,' but he will say to you, 'Be silent: I see it, if you don't.'

Lincoln said further:

"The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if

not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no man should hold the power of bringing this oppression upon us."

On page 30 of the book, Senator Taft criticized the action of President Theodore Roosevelt in seizing Panama. He also charged President Franklin Roosevelt with usurping authority in sending American troops to Iceland to replace British troops in 1941. Listen to his words:

I do not believe history will defend as lawful the action of President Theodore Roosevelt in seizing Panama.

On the other hand, that action was certainly not the making of war.

The administration pamphlet to which I have referred cites the case of Iceland and says that none of the constitutional restrictions was regarded by President Roosevelt "as a limitation on his power to use the Navy in the North Atlantic Area or send troops to Iceland and Greenland and other places." My own view is that President Roosevelt clearly usurped authority when he sent American troops to Iceland to replace the British troops there in 1941, and I made a vigorous protest at the time on the floor of the Senate and was supported also by Senator Danaher. I quote from the speech which I made on July 10, 1941, and which, as far as I remember, was answered by no one except Senator Connally.

"Mr. President, on Monday the President of the United States notified the Senate that forces of the United States Navy had already arrived in Iceland in order to supplement, and eventually to replace the British forces now stationed there. This action was taken in accordance with an understanding reached by the President with the Prime Minister of Iceland, frankly inspired, however, according to the Prime Minister, by the British Minister to Iceland, who explained to him that British forces in Iceland were required elsewhere, and suggested that he apply to the United States for forces. The Prime Minister stressed the fact that the United States forces must be strong enough to meet every eventuality; and the President promised that the Government of the United States would immediately send troops, apparently including the United States Army as well as the Navy, to supplement, and eventually to replace, the British forces now there. Judging from the various press reports, it is likely that 80,000 American boys are in course of being sent to Iceland 2400 miles from any American territory, and substantially a part of the continent of Europe.

"In my opinion, the President has no legal or constitutional right to send American troops to Iceland. It is not an agreeable task for me to question the authority of the President to take any action which he has taken in the name of the Government of the United States; but I believe it would be most unfortunate if the Senate of the United States should acquiesce without protest in acts of the President which nullify for all time the constitutional authority distinctly reserved to Congress to declare war.

"It would be a tremendous stretching of the Constitution to say that without authority from Congress the President of the United States can send hundreds of thousands of American soldiers to Europe when a war is raging over that entire Continent, and the presence of American troops would invariably lead to war. The President cannot make aggressive war. Neither can he intervene in a war between two other nations, because such intervention, even though it does not immediately involve a physical attack on one of the combatants, is clearly the making of war.

"There has been no attack on the United States and no threat of attack. The action of the President is not only beyond the powers which the Constitution has granted to him, but it is a deliberate violation of his pledge to the American people."

In this chapter on Presidential and congressional power in foreign policy, Senator Taft had the following to say about what he considered to be the lack of the constitutional right of a President to send troops abroad in such a way as to intervene in a war between nations. I read the following paragraphs starting on page 31 of the book:

The speech which I made in the Senate on March 29, 1951, refers to various supporting statements by J. Reuben Clark, Assistant Secretary of State under the Hoover administration, by Quincy Wright, professor at the University of Chicago, and by Attorney General George E. Wickersham. We have perhaps even more eminent authority to the effect that the President has no right to

send troops abroad in such a way as to intervene in a war between two nations. When the Germans broke through in France in June 1949 Mr. Roosevelt gave every encouragement to France and England to go on fighting. The end of his letter of June 15, 1940, to Premier Reynaud is enlightening, and I quote:

"In these hours which are so heart-rending to the French people and yourself, I send you the assurances of my utmost sympathy, and I can further assure you that so long as the French people continue in defense of their liberty, which constitutes the cause of popular institutions throughout the world, so long will they rest assured that materiel and supplies will be sent to them from the United States in every increasing quantities and kind.

"I know that you will understand that these statements carry with them no implication of military commitments. Only the Congress can make such commitments.

"FRANKLIN D. ROOSEVELT."

Yet Harry S. Truman in the case of Korea undertook to do exactly the thing which Franklin Roosevelt said he had no power to do.

In the case of Korea it was claimed that the intervention could take place under the United Nations Charter on the call of the Security Council. Of course the Security Council never acted under Articles 41 and 42 of the United Nations Charter, and even if it had done so the obligation to send troops is clearly limited by Article 43. That Article provides that troops can only be called for when an agreement has been entered into with the Security Council specifying the number and character of the assistance to be furnished. No such agreement has ever been entered into. The United Nations Participation Act of 1945, approved by President Truman, also made it clear that an agreement which required the providing of military aid must be subsequently approved by Congress, and, of course, it never has been. Not only that, but President Truman sent a cable from Potsdam when the United Nations Charter was under consideration, in which he said: 'When any such agreement or agreements are negotiated, it will be my purpose to ask the Congress by appropriate legislation to approved them.' The charter was adopted largely on that assurance, but now the President's claims are far beyond what they were then.

The State Department itself admits that the action of the Security Council in the Korean case was only a recommendation under Article 39. If the President can carry out every recommendation of the Security Council or the General Assembly supported by the vote of the American representative whom he can direct, then he has almost unlimited power to do anything in the world in the use of either troops or money. The Security Council might recommend that the nations should rebuild the canals on the Tigris and Euphrates and establish a vast Garden of Eden in the Kingdom of Iraq. According to the argument made, the President would then have power to use all American forces to establish such an economic project. On the same theory, he could send troops to Tibet to resist Communist aggression or to Indo-China or anywhere else in the world without the slightest voice of Congress in the matter. If that could be the effect of an international treaty, we had better watch closely the approval of any such treaty in the future. Of course, it is not.

My conclusion, therefore, is that in the case of Korea, where a war was already under way, we had no right to send troops to a nation, with whom we had no treaty, to defend it against attack by another nation, no matter how unprincipled that aggression might be, unless the whole matter was submitted to Congress and a declaration of war or some other direct authority obtained.

The question of sending troops to Europe is certainly much more complicated. There is no doubt about the President's power to send troops to occupied Germany. There is no question that he can send them if he wants to do so, as Commander in Chief of the Army and Navy. Whether Congress could limit the number to be sent is a point which may be open to question. However, certainly the President has the power to do so if Congress does not act.

I think he can station troops in a friendly country if such country asks that the troops be sent and if there is no imminence of attack and if they are stationed there for some possible convenience in repelling a general attack upon the United States itself.

Particularly, it seems to me that the President of the United States may station air forces and may send the Navy to odd places throughout the world,

as Presidents have done many times, because the sending of such forces does not necessarily involve or threaten involvement in war. Such forces can be easily withdrawn in case an attack is made upon the country. There is no question about their remaining there and becoming involved in a war, if our country determines that it does not wish to become involved in a war.

But it seems clear to me that the sending of troops without authorization by Congress to a country under attack, as was done in Korea, is clearly prohibited. The sending of troops under the Atlantic Pact as a part of a defensive operation against Russia without previous authority from Congress appears to me to be also prohibited, because the fact that these countries are threatened by an actual attack is the very justification and reason for sending the troops. The only reason for sending troops is to defend a country against a threatened military attack which would necessarily involve the United States in war.

As I am sure most Members of the Senate know, Senator Taft believed that a strict conclusion of the Constitution in respect to warmaking powers is essential to protecting the rights of the American people in the maintenance of a system of constitutional checks and balances.

Starting on page 35 of the book, he writes as follows:

The proponents of executive power have referred to many statements from the writings of Professor Edward S. Corwin of Princeton, a noted authority on constitutional law, but on this subject, he says:

"The outstanding fact about the Administration's proposal from the point of view of constitutional law is that it raises a question of first impression. The proposal is novel, unprecedented and consequently the precedents do not apply to it, except perhaps in the case of Iceland in 1941. The Administration's present proposal incurs the danger of precipitating war, and it raises vast questions regarding finance and the internal welfare of the country. Congress has the right to safeguard its war-declaring power, and it is duty bound to protect the domestic interests to which its other powers extend. In fact, the right of the President to merge American forces with an army, which he cannot exclusively command, seems very dubious. Congressional authorization under the necessary and proper clause would seem to be essential."

Throughout the 1951 delegate the Administration tried to avoid this question of setting up an international army, but there can be no doubt that that was in fact the project, as I point out in Chapter Five.

Under that project the President actually appointed General Eisenhower, in a letter in which he stated:

"The North Atlantic Treaty nations have agreed on the defense organization for Europe and at their request I have designated you as supreme allied commander, Europe. I view their request as a pledge that their support of your efforts will be complete and unequivocal."

When the President of the United States went that far he exceeded his authority. Up to that point, what was done at Brussels was a recommendation of the Council under the Atlantic Pact. When the President undertook to carry out that recommendation he usurped the powers of Congress. He had no authority to carry out that particular agreement made at Brussels, without submitting it to Congress.

Apparently the Administration is afraid that there was such an exceeding of authority, for it has represented the whole project now as merely the sending to Europe of a few divisions, which we can withdraw at any moment, but only to co-operate with the other nations in case war comes in a general defense under the terms of the Atlantic Pact.

But whether there is to be an American army or an international army, I do not believe the President has the power without congressional approval to send troops to one country to defend it against a possible or probable attack by another country.

Such action may perhaps be authorized by treaty, but it has not been authorized by treaty, but it has not been authorized either by the United Nations Charter, as I have shown, or by the Atlantic Pact.

In my opinion, the Senate resolution and the concurrent resolution adopted by the Senate on April 4, 1951, was a clear statement by the Senate that it has the right to pass on any question of sending troops to Europe to implement the Atlantic Pact, that it is unconstitutional for the President to send any troops abroad to implement that pact without congressional approval, at

least until war comes and Article 5 takes effect. It has been said that this resolution is not a law, and, of course, that is true, but the declaration can be implemented by the Appropriations Committee and by other legislation when legislation becomes appropriate. There can be no doubt that it is a legislative act and that it clearly asserts the power of Congress and the Senate.

No one can prevent the President continuing to assert his power as President, and it may be that he does have the ability to involve the United States in war even when he has no right to do so; but I think a great forward step in defense of constitutional law has been taken by the definite position now asserted by the Senate.

The President acts at his own peril, if he chooses to usurp authority which the representatives of the people have asserted that he does not possess.

I share Taft's major views on the limitations of the separation of powers doctrine as far as Presidential power is concerned. I have fought for those views on the floor of the Senate from 1955, when I started to argue against this erosion of constitutional checks that involved violation of the separation of powers doctrine in the Formosa resolution. And I have consistently fought for this constitutional doctrine time and time again, to my great political disadvantage.

But I would rather be judged by my stand on constitutional law than by yielding to the political expediency of executive administrations which time and time again have succeeded in persuading Members of Congress to surrender their clear duty to uphold our system of constitutional checks upon the executive branch of our Federal system of self government by a supposedly free people.

I think a great step has been taken here by the checking resolution of the Senator from Arkansas because all it says, in effect, is that it is time that we return to the checking power that the Constitution vests in the Senate of the United States including—noting the reference of Taft to the Appropriations Committee—the power of the purse strings.

Mr. President, because it is not a long chapter, I ask unanimous consent that the entire chapter of Senator Taft entitled, "The Place of the President and Congress in Foreign Policy," be printed in the Record at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. MORSE. I submit that the chapter as a whole is a cogent argument in support of the resolution of the Senator from Arkansas.

Mr. President, I am completely impersonal about this. I make no reference to any individual President, but I say that the Senate has permitted the Office of the Presidency to usurp the constitutional powers of the Senate time and time again because we have refused to carry out our trust to check the executive branch of the Government in respect to foreign policy commitments.

It is about time that we return to the Constitution and make clear that boys are not going to be sent to die on battlefields anywhere in the world unless our Presidents follow constitutional processes.

Passing an unconstitutional resolution such as the Tonkin Gulf joint resolution does not meet constitutional processes.

I would, therefore, go further than the resolution of the Senator. I would seek to rescind some of the action already taken in resolutions such as the Tonkin Gulf, Formosa, Middle East and other unwarranted commitments in order to correct some past mistakes. The time has come when we ought to make perfectly clear to the executive branch of the Government that no longer are we going to give support to past mistakes that the Senate of the United States has unwisely yielded to under presidential urgings but which have had the effect of eroding way the protecting shield of the constitutional rights of all of the American people.

EXHIBIT 1

THE PLACE OF THE PRESIDENT AND THE CONGRESS IN FOREIGN POLICY

No one can question the fact that the initiative in American foreign policy lies with the President. But, if I can judge from my mail and from many considered editorial expressions, the American people certainly do not believe or intend that his power shall be arbitrary and unrestrained. They want a voice in the more important features of that policy, particularly those relating to

peace and war. They expect their Senators and Congressmen to be their voice. Before discussing the correctness of the principles of foreign policy, therefore, I shall try to define the place of Congress and the President under our Constitution. The debates in the Senate in early 1951 had even more to do with the question of who shall determine policy than with policy itself.

There can be no question that the executive departments have claimed more and more power over the field of foreign policy at the same time that the importance of foreign policy and its effect on every feature of American life has steadily increased. If the present trend continues it seems to me obvious that the President will become a complete dictator in the entire field of foreign policy and thereby acquire power to force upon Congress all kinds of domestic policies which must necessarily follow.

The fundamental issue in the "great debate" was, and is, whether the President shall decide when the United States shall go to war or whether the people of the United States themselves shall make that decision. Also, for many years the State Department has been developing a theory that almost any action can be taken by executive agreement, which does not absolutely require any congressional approval at all, instead of by the treaty method prescribed in the Constitution. Undoubtedly, the necessity of obtaining a two-thirds vote in the Senate is very difficult and has encouraged many people to think that this development was necessary. But if the treaty method is not satisfactory, then the Constitution should be amended to provide for the approval of all executive agreements and to define the scope of and effect of such agreements much more clearly than at present.

More and more the State Department has assumed to do many things which are beyond its power in the field of trade, by an executive agreement known as the General Agreement on Tariff and Trade (GATT). It has insisted that the Executive have the power to raise and lower tariffs, through reciprocal trade agreements, within constantly widening limits and without the slightest shadow of a standard prescribed by law. Political agreements as important as those made at Yalta have never been submitted to Congress at all.

The execution of international agreements, such as the United Nations Charter and the Atlantic Pact, has now given rise to extended claims that the President can do anything which can be related to those treaties and anything recommended by the international commissions there created, without any consultation whatever with Congress.

I think it is fair to say that the State Department has adopted an attitude of hostility toward Congress and an unwillingness to submit any matter to Congress if it thinks it can possibly carry it through without such submission. It shows a complete distrust of the opinion of the people, unless carefully nursed by State Department propaganda.

The matter was brought to an issue by the intervention of the President in the Korean War without even telling Congress what he was doing for several weeks. And it was brought still further to the fore by the proposal that we commit troops to an international army under the control of a council of twelve nations. I do not think that the American people have ever faced a more serious constitutional issue or one which in the end may present threat to their freedom.

In the long run, the question which the country must decide involves vitally not only the freedom of the people of the United States but the peace of the people of the United States. More and more, as the world grows smaller, we are involved in problems of foreign policy. If in the great field of foreign policy the President has the arbitrary and unlimited powers he now claims, then there is an end to freedom in the United States not only in the foreign field but in the great realm of domestic activity which necessarily follows any foreign commitments. The area of freedom at home becomes very circumscribed indeed.

If the President has unlimited power to involve us in war, then I believe that the consensus of opinion is that war is more likely. History shows that when the people have the opportunity to speak they as a rule decide for peace if possible. It shows that arbitrary rulers are more inclined to favor war than are the people at any time. This question has become of tremendous importance, perhaps greater than any particular problem of troops to Europe or the manner in which the Korean War shall be conducted. The claims made by the President of the United States and by various documents presented to the Sen-

ate by the executive representatives far exceed the powers claimed by President Roosevelt during World War II, those claimed by President Truman when the United Nations Charter was passed, and those claimed by President Truman when the Atlantic Pact was adopted.

On January 4, last, President Truman, commenting on the Coudert resolution to bar him from sending more troops to Europe without the consent of Congress, said emphatically that he did not need the permission of Congress to take such action.

On January 11, at a press interview, according to the *Washington Post*:

"Mr. Truman, whose right to send troops to Europe recently was challenged by Senator Taft, said he had the power to send them any place in the world. This, he said, had been repeatedly recognized by Congress and the Supreme Court.

"A reporter asked Mr. Truman in effect what would happen if Congress tried to tie his hands by putting restrictions in the appropriation bills for the forces to be sent to Europe.

"That, said the President, was up to Congress. If they wanted to go to the country about it, he said, he would go with them—and he recalled that he licked them once."

At the President's conference a week later, on January 18, according to the press:

"He repeated that his constitutional authority to send American forces to Europe to take up their positions in an integrated European army was clear and did not depend upon the consent of Congress. What he would be glad to have, he said in substance, was a Senate expression that affirmed his constitutional authority."

Furthermore, a document was submitted to Congress, entitled *Powers of the President to Send the Armed Forces Outside the United States*, dated February 28, 1951, which was printed, though not endorsed, by the Joint Committees on Foreign Relations and Armed Services of the Senate. This document contains the most unbridled claims for the authority of the President that I have ever seen written in cold print. In effect, the document asserts that whenever in his opinion American foreign policy requires he may send troops to any point whatsoever in the world, no matter what the war in which the action may involve us. The document also claims that in sending armed forces to carry out a treaty the President does not require any statutory authority whatever, and it does not recognize the difference between a self-executing treaty and one which requires, even by its own true terms, congressional authority. It ends with the most sweeping claims for power:

"As this discussion of the respective powers of the President and the Congress in this field, has made clear, constitutional doctrine has been largely molded by practical necessities. Use of the Congressional power to declare war, for example, has fallen into abeyance because wars are no longer declared in advance. The Constitutional power of the Commander in Chief has been exercised more often, because the need for armed international action has grown more acute. The long delays occasioned by the slowness of communications in the eighteenth century have given place to breathtaking rapidity in the tempo of history. Repelling aggression in Korea or Europe cannot wait upon Congressional debate. However, while the need for speed and the growth in the size and complexity of the armed forces enlarged the area in which the powers of the Commander in Chief are to be wielded, the magnitude of present-day military operations and international policies requires a degree of Congressional support that was unnecessary in the days of the nineteenth century."

That seems a very gracious concession to Congress. Congress no longer has any power to act. It is simply given the right to support the President after the President has acted. I was shocked in the very beginning of this controversy by the speed with which blind partisans in the administration rushed to the defense of the proposition that the President can make war and warlike commitments. Senator Connally, the chairman of the Foreign Relations Committee, made this extraordinary assertion on the floor of the Senate:

The scope of the authority of the President as Commander in Chief to send the Armed Forces to any place required by the security interests of the United States has often questioned, but never denied by authoritative opinion.

That certainly is a complete misrepresentation of the discussion of these constitutional powers which has taken place since the foundation of the nation.

As soon as I made my speech of January 5, 1951, the *New York Times* rushed to get Professor Henry Steele Commager to throw together in a day or two a superficial article, published in its Sunday magazine at that time, in which he asserts that the President has the right to start war whenever he sees fit to do so.

Editors of many newspapers and magazines accepted without question the State Department's claims, made without any basis, that history books have listed more than one hundred and thirty cases where United States Presidents sent United States armed troops into action "to defend the national interest."

The most interesting but alarming thing is that there seem to be so many responsible people in the country who follow the party line of the State Department in foreign policy with complete blindness as to where it may lead, in spite of the fact that it has led us a long way toward disaster recently and in spite of the fact that it may be the opposite of a policy adopted six months earlier. In so doing, they blithely dismiss all interest in the maintenance of popular government under the Constitution. They are obviously afraid of popular government, thinking that the people are too dumb to understand foreign policy and might oppose policies which these blind followers favor but which the people think may lead to war.

Of course, the President has wide powers in foreign policy, but the framers of the Constitution provided expressly that only Congress could do certain things. Those powers are expressed in Section 8 of Article I. Of course, Congress is given the power, and the exclusive power—

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

"To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

That reflects a certain and definite suspicion of a possible desire on the part of some President to set up a great permanent military force. Further powers of Congress as stated in Section 8:

"To provide and maintain a navy.

"To make rules for the government and regulation of the land and naval forces."

There are other powers, such as calling forth the militia and disciplining the militia.

The Constitution also provides that the President shall have the power to make treaties, but only by and with the advice and consent of the Senate, provided two thirds of the Senators present concur. The President's relationship to the armed forces is stated only in Section 2 of Article II of the Constitution:

"The President shall be Commander in Chief of the Army and Navy of the United States . . ."

There is one very definite limit—and I think it is admitted by every responsible authority who has discussed the problem—on the President's power to send troops abroad: he cannot send troops abroad if the sending of such troops amounts to the making of war. I think that has been frequently asserted; and whenever any broad statements have been made as to the President's power as Commander in Chief to send troops anywhere in the world the point has been made that it is always subject to that particular condition.

Perhaps no one has been quoted more on this general subject than has my father, who discussed this question in various lectures, articles, and books. My father had wide experience, as governor general of the Philippines, Secretary of War, and President of the United States. He never served in a legislative body, and, if anything, I think he leaned toward the power of the Executive. The clearest statement of the question, I believe, is contained in his article in the June 6, 1916, number of the *Yale Law Journal*, from which I quote:

"When we come to the power of the President as Commander in Chief, it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the Army to be moved from one part of the country to another. The power to declare war is given to Congress. . . . This is necessarily a limitation on the power of the President to order the Army and the Navy to commit an act of war. It was charged against President Polk that he had carried on a foreign war against Mexico before Congress had authorized it or declared it, and it is difficult to escape the conclusion that the act of President Wilson in seizing Veraacruz was an act of war

without congressional authority, at the time it was committed, though a resolution authorizing it was pending, and had passed one House and was passed in a very short time after the act by the other House, constituting a valid ratification.

"It is not always easy to determine what is an act of war. The President has the authority to protect the lives of American citizens and their property with the Army and Navy. This grows out of his control over our foreign relations and his duty to recognize as a binding law upon him the obligation of the Government to its own citizens. It might, however, be an act of war if committed in a country like England or Germany or France which would be unwilling to admit that it needed the assistance of another government to maintain its laws and protect foreign relations, but would insist that injuries of this sort must be remedied through diplomatic complaints and negotiations. . . . Of course, the President may so use the Army and Navy as to involve the country in actual war and force a declaration of war by Congress. *Such a use of the Army and Navy, however, is a usurpation of power on his part.*" (Italics mine.)

Some may feel that if the President can do certain things there is no sense in arguing that he has no right to do them. But the division and limitation of powers is the very basis of our constitutional system, and decisions regarding the proper limits of such powers affect the validity of many other actions, such as the right of Congress to pass legislation to restrain the President's authority to send troops abroad in such a way as to involve the country in war. True, the President perhaps cannot be prevented from usurping power, but we can only presume the President will follow constitutional laws passed by the people's representatives.

Most of the cases which have been cited as authority for the President sending troops abroad are cases where the use of our troops was limited to the protection of American citizens or of American property.

The Boxer Rebellion is frequently cited; but in that case troops were sent into China because the legations in Peking were besieged and the legitimate Chinese Government was unable to defend them against the rebellious Boxers. So the various nations sent their troops there, in order to rescue those who were in the legations. That was a clear effort to protect American lives, to protect American diplomatic lives which were threatened contrary to the law of nations; and certainly it was not an act which would necessarily involve us in war.

The case of the Mexican rebellion is referred to, and it was referred to by my father, who said that President Polk's right was challenged. It was challenged by a very distinguished American, Abraham Lincoln, who on February 15, 1848, wrote his law partner with reference to Polk's use of the Army against Mexico:

"Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect. If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him 'I see no probability of the British invading us,' but he will say to you, 'Be silent: I see it, if you don't.'"

Lincoln said further:

"The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us."

I do not believe history will defend as lawful the action of President Theodore Roosevelt in seizing Panama.

On the other hand, that action was certainly not the making of war.

The administration pamphlet to which I have referred cites the case of Iceland and says that none of the constitutional restrictions was regarded by President Roosevelt "as a limitation on his power to use the Navy in the North Atlantic Area or send troops to Iceland and Greenland and other

places." My own view is that President Roosevelt clearly usurped authority when he sent American troops to Iceland to replace the British troops there in 1941, and I made a vigorous protest at the time on the floor of the Senate and was supported also by Senator Danaher. I quote from the speech which I made on July 10, 1941, and which, as far as I remember, was answered by no one except Senator Connally :

"Mr. President, on Monday the President of the United States notified the Senate that forces of the United States Navy had already arrived in Iceland in order to supplement, and eventually to replace, the British forces now stationed there. This action was taken in accordance with an understanding reached by the President with the Prime Minister of Iceland, frankly inspired, however, according to the Prime Minister, by the British Minister to Iceland, who explained to him that British forces in Iceland were required elsewhere, and suggested that he apply to the United States for forces. The Prime Minister stressed the fact that the United States forces must be strong enough to meet every eventuality; and the President promised that the Government of the United States would immediately send troops, apparently including the United States Army as well as the Navy, to supplement, and eventually to replace, the British forces now there. Judging from the various press reports, it is likely that 80,000 American boys are in course of being sent to Iceland 2400 miles from any American territory, and substantially a part of the continent of Europe.

"In my opinion, the President has no legal or constitutional right to send American troops to Iceland. It is not an agreeable task for me to question the authority of the President to take any action which he has taken in the name of the Government of the United States; but I believe it would be most unfortunate if the Senate of the United States should acquiesce without protest in acts of the President which might nullify for all time the constitutional authority distinctly reserved to Congress to declare war.

"It would be a tremendous stretching of the Constitution to say that without authority from Congress the President of the United States can send hundreds of thousands of American soldiers to Europe when a war is raging over that entire Continent, and the presence of American troops would inevitably lead to war. The President cannot make aggressive war. Neither can he intervene in a war between two other nations, because such intervention, even though it does not immediately involve a physical attack on one of the combatants, is clearly the making of war.

"There has been no attack on the United States and no threat of attack. The action of the President is not only beyond the powers which the Constitution has granted to him, but it is a deliberate violation of his pledge to the American people."

The speech which I made in the Senate on March 29, 1951, refers to various supporting statements by J. Reuben Clark, Assistant Secretary of State under the Hoover administration, by Quincy Wright, professor at the University of Chicago, and by Attorney General George E. Wickersham. We have perhaps even more eminent authority to the effect that the President has no right to send troops abroad in such a way as to intervene in a war between two nations. When the Germans broke through in France in June 1940 Mr Roosevelt gave every encouragement to France and England to go on fighting. The end of his letter of June 15, 1940, to Premier Reynaud is enlightening, and I quote :

"In these hours which are so heart-rending to the French people and yourself I send you the assurances of my utmost sympathy, and I can further assure you that so long as the French people continue in defense of their liberty, which constitutes the cause of popular institutions throughout the world, so long will they rest assured that materiel and supplies will be sent to them from the United States in ever increasing quantities and kind

"I know that you will understand that these statements carry with them no implication of military commitments. Only the Congress can make such commitments

"FRANKLIN D ROOSEVELT"

Yet Harry S. Truman in the case of Korea undertook to do exactly the thing which Franklin Roosevelt said he had no power to do

In the case of Korea it was claimed that the intervention could take place under the United Nations Charter on the call of the Security Council. Of

course the Security Council never acted under Articles 41 and 42 of the United Nations Charter, and even if it had done so the obligation to send troops is clearly limited by Article 43. That Article provides that troops can only be called for when an agreement has been entered into with the Security Council specifying the number and character of the assistance to be furnished. No such agreement has ever been entered into. The United Nations Participation Act of 1945, approved by President Truman, also made it clear that any agreement which required the providing of military aid must be subsequently approved by Congress, and, of course, it never has been. Not only that, but President Truman sent a cable from Potsdam when the United Nations Charter was under consideration, in which he said: "When any such agreement or agreements are negotiated, it will be my purpose to ask the Congress by appropriate legislation to approve them." The charter was adopted largely on that assurance, but now the President's claims are far beyond what they were then.

The State Department itself admits that the action of the Security Council in the Korean case was only a recommendation under Article 39. If the President can carry out every recommendation of the Security Council or the General Assembly supported by the vote of the American representative whom he can direct, then he has almost unlimited power to do anything in the world in the use of either troops or money. The Security Council might recommend that the nations should rebuild the canals on the Tigris and Euphrates and establish a vast Garden of Eden in the Kingdom of Iraq. According to the argument made, the President would then have power to use all American forces to establish such an economic project. On the same theory, he could send troops to Tibet to resist Communist aggression or to Indo-China or anywhere else in the world, without the slightest voice of Congress in the matter. If that could be the effect of an international treaty, we had better watch closely the approval of any such treaty in the future. Of course, it is not.

My conclusion, therefore is that in the case of Korea where a war was already under way we had no right to send troops to a nation with whom we had no treaty to defend it against attack by another nation no matter how unprincipled that aggression might be unless the whole matter was submitted to Congress and a declaration of war or some other direct authority obtained.

The question of sending troops to Europe is certainly much more complicated. There is no doubt about the President's power to send troops to occupied Germany. There is no question that he can send them if he wants to do so as Commander in Chief of the Army and Navy. Whether Congress could limit the number to be sent is a point which may be open to question. However certainly the President has the power to do so if Congress does not act.

I think he can station troops in a friendly country if such country asks that the troops be sent and if there is no imminence of attack and if they are stationed there for some possible convenience in repelling a general attack upon the United States itself.

Particularly it seems to me that the President of the United States may station air forces and may send the Navy to odd places throughout the world as Presidents have done many times because the sending of such forces does not necessarily involve or threaten involvement in war. Such forces can be easily withdrawn in case an attack is made upon the country. There is no question about their remaining there and becoming involved in a war, if our country determines that it does not wish to become involved in a war.

But it seems clear to me that the sending of troops without authorization by Congress to a country under attack, as was done in Korea, is clearly prohibited. The sending of troops under the Atlantic Pact as a part of a defensive operation against Russia without previous authority from Congress appears to me to be also prohibited because the fact that these countries are threatened by an actual attack is the very justification and reason for sending the troops. The only reason for sending troops is to defend a country against a threatened military attack which would necessarily involve the United States in war.

The European Army Project, however, goes further than merely sending troops to implement the Atlantic Pact. It involves the sending of troops to an international army similar to that which was contemplated under the United Nations Charter. It is an international army, apparently established by twelve nations, with a commander who is appointed by the twelve nations. It seems to me perfectly clear that the President's power as Commander in Chief does

not extend to the delegation of that power to a commander who is chosen by any other nation or any other group of nations. I think it is perfectly clear that he cannot enter into an agreement of that kind to set up an international army without submitting the agreement to Congress.

The proponents of executive power have referred to many statements from the writings of Professor Edward S. Corwin of Princeton, a noted authority on constitutional law, but on this subject he says:

"The outstanding fact about the Administration's proposal from the point of view of constitutional law is that it raises a question of first impression. The proposal is novel, unprecedented and consequently the precedents do not apply to it, except perhaps in the case of Iceland in 1941. The Administration's present proposal incurs the danger of precipitating war, and it raises vast questions regarding finance and the internal welfare of the country. Congress has the right to safeguard its war-declaring power, and it is duty bound to protect the domestic interests to which its other powers extend. In fact, the right of the President to merge American forces with an army, which he cannot exclusively command, seems very dubious. Congressional authorization under the necessary and proper clause would seem to be essential."

Throughout the 1951 debate the Administration tried to avoid this question of setting up an international army, but there can be no doubt that that was in fact the project, as I point out in Chapter Five.

Under that project the President actually appointed General Eisenhower, in a letter in which he stated:

"The North Atlantic Treaty nations have agreed on the defense organization for Europe and at their request I have designated you as supreme allied commander, Europe. I view their request as a pledge that their support of your efforts will be complete and unequivocal."

When the President of the United States went that far he exceeded his authority. Up to that point, what was done at Brussels was a recommendation of the Council under the Atlantic Pact. When the President undertook to carry out that recommendation he usurped the powers of Congress. He had no authority to carry out that particular agreement made at Brussels, without submitting it to Congress.

Apparently the Administration is afraid that there was such an exceeding of authority, for it has represented the whole project now as merely the sending to Europe of a few divisions, which we can withdraw at any moment, but only to co-operate with the other nations in case war comes in a general defense under the terms of the Atlantic Pact.

But whether there is to be an American army or an international army, I do not believe the President has the power without congressional approval to send troops to one country to defend it against a possible or probable attack by another country.

Such action may perhaps be authorized by treaty, but it has not been authorized either by the United Nations Charter, as I have shown, or by the Atlantic Pact.

In my opinion, the Senate resolution and the concurrent resolution adopted by the Senate on April 4, 1951, was a clear statement by the Senate that it has the right to pass on any question of sending troops to Europe to implement the Atlantic Pact, that it is unconstitutional for the President to send any troops abroad to implement that pact without congressional approval, at least until war comes and Article 5 takes effect. It has been said that this resolution is not a law, and, of course, that is true, but the declaration can be implemented by the Appropriations Committee and by other legislation when legislation becomes appropriate. There can be no doubt that it is a legislative act and that it clearly asserts the power of Congress and the Senate.

No one can prevent the President continuing to assert his power as President, and it may be that he does have the ability to involve the United States in war, even when he has no right to do so; but I think a great forward step in defense of constitutional law has been taken by the definite position now asserted by the Senate.

The President acts at his own peril, if he chooses to usurp authority which the representatives of the people have asserted that he does not possess.

Mr. FULBRIGHT. Mr. President, I thank the Senator. I particularly appreciate his taking the trouble to bring to our attention the passages from the late Senator Taft's book.

I remember very well when Senator Taft was here and we had the question involving the presence of our troops in Europe.

I commend the Senator from Oregon because he is one of the very few, if not the only Senator, who has consistently taken the position he has mentioned, beginning with the Formosa resolution and extending up to the present. I know of no exception in his case.

In my own case, I have faltered once or twice for reasons that I will not go into now, but may later. At any rate, the Senator from Oregon, does, to my knowledge, have the best and most consistent record on this problem of any Senator whom I know of.

I yield to the Senator from Idaho.

MR. CHURCH. Mr. President, I am glad to defer to the Senator from North Carolina.

THE PRESIDING OFFICER. The Senator from North Carolina is recognized.

MR. ERVIN. Mr. President, the Senator from Arkansas [Mr. FULBRIGHT], the Senator from Oregon [Mr. MORSE], the Senator from Mississippi [Mr. STENNIS], the Senator from Louisiana [Mr. ELLENDER], and the Senator from South Carolina [Mr. THURMOND] have appeared before the Subcommittee on the Separation of Powers and have made some very fine statements on various aspects of the constitution.

I had printed in the CONGRESSIONAL RECORD of today, with the permission of the distinguished senior Senator from Oregon, the statement which the Senator from Oregon made before that subcommittee.

I did so because I feel that his statement merits the consideration of American people since it deals in a very eloquent and forceful manner with the war powers under the Constitution and also with the field to which the resolution offered by the Senator from Arkansas relates.

The statement of the Senator from Oregon, like the statement of the Senator from Arkansas before the subcommittee, deals in a very thorough fashion with the question of the sharing of the power between the Executive and Congress in general and, in particular, with the field of foreign relations.

For this reason the statements certainly merit the thoughtful consideration of all Americans who, as I say, are not only interested in preserving constitutional government, but also in having a very sound and sensible manner for dealing with our foreign relations in a most precarious world.

MR. FULBRIGHT. Mr. President, I thank the Senator. I yield to the Senator from Idaho [Mr. CHURCH].

THE PRESIDING OFFICER. The Senator from Idaho is recognized.

MR. CHURCH. Mr. President, I join with the other Senators who have expressed appreciation to the distinguished chairman of the Committee on Foreign Relations for a most important resolution.

As I listened to the colloquy, it occurred to me that when the Founding Fathers wrote the Constitution they were mindful of the entangling alliances that had so often led European countries to war with one another, largely in the service of kingly ambitions.

The Founding Fathers had a healthy distrust for executive power and sought therefore to restrict the power of the Presidency in order that an overly ambitious President—whoever he might be—would not lead the country unchecked into a foreign misadventure.

The Constitution is very precise.

I do not know that I can list, offhand, all of the ways that the Constitution imposes restrictions upon the powers of the Presidency in the field of foreign affairs, but I can think of the more conspicuous provisions:

First, it empowered Congress, not the President, with the right to declare war.

Second, it empowered Congress, not the President, with the right to raise and maintain armies and navies.

Third, it conferred upon Congress, not the President, the power over the public purse with which any kind of foreign adventure would have to be financed.

Fourth, it gave to the Senate certain additional powers, the power of confirmation, including presidential ambassadors, and the power of treaty ratification.

I have been told that a very distinguished citizen of this country, Mr. Dean Acheson, who has certainly been the friend and adviser of Presidents, recently

commented that the most important single change in this century in the structure of the Federal Government has been the great expansion of the powers of the Presidency. I believe this is certainly true.

If we were to go back over the express delegations of authority to Congress under the Constitution, in the field of foreign affairs, I believe it would become clear how far this process has gone.

First, the power to declare war, as the distinguished Senator from Oregon has already noted, seems to be out of date. Wars are no longer declared, and therefore the power of Congress to make the decision has been circumvented.

Second, the power to raise and maintain armies, conferred also upon Congress, has been diminished by the President in the exercise of his authority as Commander in Chief. He has assumed the right to send our Armed Forces into action whenever he deems it in the national interest, and then it becomes impossible for Congress to do other than to vote the necessary money to sustain them, once they have taken the field. So this power has been effectively circumvented.

Third, there is the power of confirmation given specifically to the Senate. Practice over the years has largely eliminated the meaning of this power, because it has become good form always to confirm Presidential appointees. Indeed, if the Senate, from time to time, raises serious questions concerning any given Presidential appointee, it is taken to task by the major newspapers for having stepped out of line, since this has come to be regarded as the responsibility and right of the President alone.

I recall that the Senator from Oregon undertook to oppose the confirmation of Claire Booth Luce, at the time President Eisenhower sought to make her ambassador to Brazil.

Mr. MORSE. I not only undertook it; I did oppose it.

Mr. CHURCH. Yes, and with great vigor. The debate went on for days. A tremendous uproar occurred in the press because of the presumption of the Senator from Oregon. When the debate ended, we bowed to custom and said it was, after all, the right of the President, and we confirmed almost automatically; I believe the Senator from Oregon may have received approximately 18 votes. Then, in the dramatic aftermath that all of us will remember, Mrs. Claire Booth Luce snatched defeat from the jaws of victory by hurling some very insulting remarks at the Senator from Oregon; and in the uproar that followed, it was thought best for the President to withdraw the nomination.

But our power had so atrophied that one assertion of it—even though the Senator won out indirectly, by happenstance, as it were—becomes a matter of historic recollection.

That is what has become of the first three powers. What of the fourth? The power of ratification of treaties? Every President has sought—and I speak now the institution of the Presidency—to maintain the prerogatives that his predecessors had exercised and, if possible, enlarge the office. That is natural enough. Moreover, the Presidency has undertaken to circumvent the Senate's power of treaty ratification by the device of executive agreements. These executive agreements have grown more numerous through the years. The President now decides whether he will bring a matter in treaty form to the Senate for our ratification or whether he will proceed, on the basis of an executive agreement, and not come to the Senate at all.

Finally, there is left to us the power of the purse—and what has happened to that? There is a new device for the circumvention of the power of the purse, the last real congressional power that remains intact in the field of foreign affairs. The device made its first appearance during the administration of President Eisenhower, in the case of the Middle East resolution: Asking Congress in advance, in general terms, for congressional ratification of a policy, the details of which had yet to be spelled out. It was used again in the Gulf of Tonkin resolution, with the great expansion of the war since undertaken in its name.

Then, the President came to Congress just a few months ago, once more intending to get, in advance, a ratification of a general policy, described in language so nebulous that none of us really knew what was involved, for more aid to Latin America.

But this time the Committee on Foreign Relations said, "No, this we will not do. To continue this pattern is to erode away the last power remaining in Congress."

But, alas, the use of an executive "commitment" is still another way to undermine congressional control of the purse. If it is possible for the Vice President, let us say, to go to Pakistan, to Thailand, or to some other country and say, "And as a final gesture of our goodwill, you may have \$50 million," or \$150 million, or whatever the figure might be, and then to come back and tell us that a commitment has been made and therefore we must vote the money—if we accept that then we accept the final kibosh on the powers of Congress in foreign affairs.

So it is high time we began to examine the question that the distinguished Senator from Arkansas has raised. I commend him for it. I believe it is an act of real statesmanship.

Mr. FULBRIGHT. I thank the Senator.

I yield to the Senator from Kansas.

Mr. CARLSON. I commend the distinguished Senator from Arkansas for what I believe is the timely introduction of the resolution. Not only will the resolution be well received in the Senate, as has been indicated, but also, it will be well received by the people of this Nation, who have become greatly concerned about what is happening to the delegation of powers by Congress to the executive branch—or the executive branch taking over the powers of Congress.

It is a timely resolution, and it will be a pleasure to be associated with the distinguished Senator from Arkansas, as a member of the Committee on Foreign Relations, in the hearings, which will be helpful and will probably determine some course of relationship and understanding between the executive branch and Congress.

As has been said, the executive branch has made commitments, and then the Committee on Foreign Relations has time and time again been confronted with the statement that the honor and integrity of the United States must be upheld because these commitments had been made. On one or two occasions, as the distinguished Senator from Idaho has said, the Foreign Relations Committee did say, "We will not tolerate that agreement." And we did not. I was rather proud of the fact that we did not.

I realize, also, that in this age of rapid communications and transportation, the world has shrunk in size; so I believe it is well that we have another review.

The Senator from Arkansas is to be commended; and when history is written, I believe this resolution will go down as one of the important matters considered in the Senate.

Mr. FULBRIGHT. I thank the Senator.

Mr. McCARTHY. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield to the Senator from Minnesota.

Mr. McCARTHY. I join with the Senator from Arkansas in support of the resolution, and I commend him for introducing it at this time.

I believe the time has come when we should give very thorough and formal consideration to the problem of the procedures by which important decisions in foreign policy have been made.

The chairman and the other members of the Committee on Foreign Relations have not been indifferent to the problem. As every Member of the Senate knows, we have tried in a practical way to work out arrangements with the executive branch. A year ago, we suggested that perhaps our committee should be some what more fully informed about the foreign policy activities of the Central Intelligence Agency. We got no response at all from the executive branch—no support for that suggestion. It was only by agreement within Congress itself that members of the Committee on Foreign Relations were finally included—at least, in a limited way—in the hearings involving that agency.

Last year, in dealing with the foreign aid bill, the committee proceeded very carefully and attentively, and with all due consideration for the administration, and suggested a limitation on grants of arms to Latin America. Formally this was recognized, but the intent of the Committee on Foreign Relations and the Senate was circumvented by a great expansion of arms sales with the support of the Department of Defense. We suggested and included in the foreign aid program last year a suggested limit on the number of countries and no attention was paid, as they greatly exceeded the number recommended.

The Committee on Foreign Relations proceeded this year to attempt to impose a tighter restraint on arms distribution, whether through grants, loans, or sales in the foreign aid bill, which is simply an extension of the offer we made

to the executive branch last year. We sought more serious and effective restraints on a number of countries in the foreign aid bill.

The Senator may recall a witness for the administration said he objected to our setting this limitation because it was irrational. We asked if he would prefer that we act rationally and name the countries and he said that would be irrational and leave the rational act to the State Department.

I believe the next step we have to take, and it may come as a result of this resolution, is to take the larger step as to where aid should go, in what amount, and to what country, as well as having the Senate approval, either as a whole, or through the Committee on Foreign Relations, as the Senate sometimes acts today on public works, military construction and even on such controversial requests as what watershed projects should be approved. With this method as the vehicle we may move toward developing new procedures to have the Senate again gain full constitutional authority in foreign affairs.

Mr. FULBRIGHT. I thank the Senator for his contribution.

Mr. AIKEN. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. AIKEN. Mr. President, I comment briefly on the Senator's resolution by repeating that old saying, "It is better late than never." I do not think we can excuse Congress from the situation which exists today, because over the last 20 or 25 years we found it easier to tell the executive branch to go ahead and take care of this matter or that matter when it was our responsibility in many cases.

We have reached the point now that if we are interested in retaining our form of government of which we boast so freely and fluently we have to do something; Congress has to reassume the responsibility, particularly in the field of foreign relations, which we were presumed to have had for the last 175 years. Yet, we have reached a point today where the executive branch, and without protest from us until recently, has felt it could send American Armed Forces into any part of the world at the request of another foreign country, or at the request of some of the people in a foreign country, or at the request of American or foreign investors in another country and involve us in full-fledged wars.

I do not blame the executive branch so much for doing this. I blame them for some of their recent mistakes in the last few years; but nevertheless Congress has to share the guilt with them because we have been too negligent and too tolerant.

I feel unless Congress reassumes the responsibility we are supposed to have we will be facing a crumbling of democracy in this country, if we are not already doing so.

I commend the Senator from Arkansas and those who have spoken with him this afternoon for their recognition of this fact.

Mr. FULBRIGHT. I appreciate the statement of the Senator, and I thank him for his contribution. I agree with him that it is late. It is too bad we did not do this earlier, but it is better late than never.

Mr. MANSFIELD. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. MANSFIELD. Mr. President, I have followed this debate and I think it has been one of the most significant debates that I have heard in all my years in the Senate. This subject has to do with a constitutional question in connection with which, as the distinguished Senator from Vermont [Mr. AIKEN] pointed out, the Senate has been very much responsible for bringing about the erosion of power.

We have approximately 42 or 43 mutual security agreements with countries or groups of countries. Some of those agreements are good, solid agreements, such as NATO and the ANZUS treaty; some are of no importance, except on paper; and others are of dubious importance, such as SEATO, which is being used flexibly today, in view of the situation in which we find ourselves in Southeast Asia.

I commend the distinguished chairman of the Committee on Foreign Relations for raising this constitutional question, and I am glad that he is going into it. I am sure his analysis of the events leading up to this resolution go back far beyond the present administration and to the end of the Second World War. This is something the Senate will have to face up to, but the Senate cannot cry too loudly about what has happened because the Senate all too often has been a complacent and willing partner.

Mr. FULBRIGHT. I thank the distinguished majority leader. I agree with what he has said. I do not think it was all our fault in letting the situation develop.

Mr. ALLOTT. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. ALLOTT. Mr. President, I have had the opportunity to listen to only a part of the statement of the Senator from Arkansas, but the part I heard by him and by other Senators is very much to the point with respect to the situation in the Senate.

I wish to underscore one thing that the distinguished Senator from Vermont said. In our general legislative areas we are responsible because we do have the opportunity on the passage of every piece of authorizing legislation to write into it the standards and guidelines which we expect the Executive to follow. In too many instances we state a preamble of great and lofty ideals and ideas, and then we, in effect, say to the President, "Here is \$500 million to do this with." No piece of legislation that has been passed by the Congress in the last 5 years is more illustrative of this point than the poverty program. The poverty program is a real problem in this country. However, the way Congress passed the act, this is in effect what we did. We appropriated \$875 million with about 7 months left in the year and the next year we appropriated \$1.75 billion, or an amount in that area. We did not do the tough and hard job of organizing a program and directing the President how to run it.

I must say that in my experience, which is basically on the Committee on Appropriations, I find time and time again that if we do seek to impress these guidelines, we are accused of doing one or two things: either complaining, which is a bad adjective to have ascribed to anyone continuously, or nit-picking.

Mr. President, the second thing I wish to comment on is the matter which the distinguished majority leader commented on three or four times in the last 2 years, in which we have failed abysmally in Congress, and that is the field of legislative oversight. These things should be added to the remarks of the distinguished senior Senator from Idaho, because Congress has not exercised the prerogative and duty of legislative oversight in that we have passed ill-advised, hasty, poor programs for the solution of recognized problems.

Then, when it became obvious that the programs were not working, we turned around and passed a new type program, piling it on top of the other, appropriated more money but did not take the trouble to take the other one off the books or reform it into a program which could be meaningful.

The third thing we should be concerned about at the moment—and I am very much concerned about—is the situation we find with treaties we have coming up before us—it has been discussed in the press and all of us have been briefed on it—regarding the three Panamanian treaties which the Senate will consider in a few months' time.

Here are three treaties negotiated by Assistant Secretary of State Irwin, a very capable man, and negotiated by Robert Anderson, former Secretary of the Treasury, a man whom we all know and I think most of us respect very highly. But after negotiating—which I believe has taken over 2 years, perhaps almost 3—we have now been made aware, at least privately, of the contents of the three treaties. When they are signed, as they have to be signed by Panama and by our President, then we are placed in the very unfortunate situation, if we do not approve or ratify the treaty, of undermining the President.

There are some features of the three treaties about which, personally, I have reservations, but I shall discuss that at a later time. But with the rapid communications in the world on the matter of these specific treaties, we are practically presented with something which has already been done. We are told that if we do not ratify them—and this is what we have been told before, and this is what we have been told in effect already—we will be undermining the President, and undermining Secretary Bob Anderson, for whom we all have great respect. But certainly there might be ways—and the distinguished chairman knows it better than anyone else—in which such critical treaties could be followed more closely and the information made available to Members of Congress so that we are not presented with a "fait accompli" at the end of the negotiations and asked to put our stamp of approval on them.

It seems to me that these three areas are areas which the Senator from Arkansas is trying to reach with his resolution. They are, perhaps, three illustrations in which I believe Congress might definitely be more effective and at

least can take back and resume, if it has the willingness to resume, the power given to it by the Constitution.

I appreciate the Senator's yielding to me for these few remarks.

Mr. FULBRIGHT. I appreciate the Senator's comments. I am bound to say a word about the Panamanian treaties. In this case, the administration has been following constitutional procedure by negotiating a treaty and submitting it. They did consult most seriously in the preliminary stages last year and earlier this year, both with the committee and also with the Subcommittee on Latin American Affairs. Thus, we have had an opportunity to give them preliminary advice. It is true, under our procedure—and it is the only procedure we have in this connection—that the Executive must finally sign them. This does create a difficulty for the Senate. When I say it has been submitted to the committee, it does not mean that the committee has approved everything in it, and it does not mean the executive branch has carried out every suggestion of the committee. All I am saying is that this is an near a normal matter as I think we can find in a treaty.

Personally, concerning the hearings, I feel that the Senate is free to adopt this treaty or not. Advance consultation with a Senate committee cannot bind the Senate, but is designed to be helpful to the executive in its negotiations. We did suggest some changes and we hope that they will be a helpful element in the negotiations. But I did not want to get on to the substantive questions of treaties. In the Panamanian treaties, they are following what I conceive to be the correct procedure.

Let me give the Senator an illustration. Take the case of Thailand with which a minor treaty involving double taxation was brought to us to approve. The committee and the Senate were expected to consider it carefully and solemnly. But then the Executive sent 40,000 troops to Thailand and committed hundreds of millions of dollars without saying a word to us about it. This seems entirely out of proportion, especially when the SEATO Treaty has not been invoked, and there is not treaty relating to our bases or men there. So, they will say, this is in pursuance of the SEATO Treaty. I believe that to be questionable. They certainly did not seek our informal or formal advice or agreement on seeking to commit vast amounts of money to Thailand. I do not know how many hundreds of millions of dollars they spent on bases in Thailand, which are going to be used, as the Senator knows, to pursue the war against the North Vietnamese.

In my view, here is the case of a commitment taken without any real approval at all. Thus, there is a distinction here. I cannot fault them too much on Panama. We might fault them on their judgment when it comes time to approve the treaties. There is necessarily built into the situation the necessity for the Executive to sign the treaties before they are submitted to the Senate formally, although they did bring to us something of a proposal, and that was that.

Mr. ALLOTT. Mr. President, will the Senator from Arkansas yield?

Mr. FULBRIGHT. I yield.

Mr. ALLOTT. I agree with the Senator, and I would not want anything I said to be understood as meaning that there has been anything unusual, illegal, "behind the door," so to speak, or anything of that sort in the way the Panamanian treaties have been handled. This is the way the Constitution is set up, that the Executive negotiates the treaty; it is signed, and then it is up to the Senate to ratify it or not.

I agree with him also that this is not the place to talk about the merits of the Panamanian treaties. I know that his resolution goes to an entirely different situation, but I did make the point, which I think could bear some examination, as to whether in some of these major treaties—and I do regard the Panamanian treaties as a major treaty area—

Mr. FULBRIGHT. It is.

Mr. ALLOTT. And I am sure the Senator does.

Mr. FULBRIGHT. It is. It is a very important area.

Mr. ALLOTT. It is unfortunate that we do not have, under the legal and lawful handling of a treaty under the Constitution, a better and quicker way to keep the Senate as a whole informed of what is occurring in these major areas.

I appreciate the Senator's yielding to me. I think his resolution has a very fine thrust and I hope that it will be followed up.

Mr. FULBRIGHT. I thank the Senator from Colorado for his remarks.

Mr. President, I shall not delay the Senate much longer, but I have a few examples which I merely wish to put in the RECORD for the information of the Senators. They illustrate some of the things I have in mind and which I think are pertinent to the resolution.

For example, on April 19, 1966, in a television appearance, the Vice President described the Honolulu declaration as follows:

... a pledge to ourselves and to posterity to defeat aggression, to defeat social misery, to build viable, free political institutions and to achieve peace. Now, those are broad terms, but *these are great commitments*. I think there is a tremendous new opening here for realizing the dream of the Great Society in the great area of Asia, not just here at home.

On that same date, during the television program, Eric Severeid summarized the interview with the Vice President with a question as follows:

You seem to be saying that the Johnson doctrine, if we may call it that, is proposing a relationship between this country and Asia far away as it is ... a relationship as fundamental, as long lasting, intimate and possibly expensive as our historic association with Europe. It is of this scale, of this magnitude?

The Vice President answered:

I think so.

I cite that simply as an example of words which are used in the midst of statements that are cited as great commitments. I personally do not consider them commitments. They are sort of proposals. They are statements of general policy, which are not to be considered commitments, although he uses that word. Perhaps he thinks they are, and perhaps we will be confronted with implementing legislation. If so, I shall not consider them as commitments. I shall consider that I am quite free to judge them upon their merits.

U.S. intervention in the Congo recently exemplifies an involvement abroad which began as a short-term international undertaking and seems to have become unilateral and open-ended. Secretary Rusk expressed surprise that the Congress was upset about the United States sending a few planes in 1967 when there was no concerted protest about the sending of planes in November of 1964 to rescue white hostages at Stanleyville. But the circumstances were entirely different then: the U.N. had just pulled out its forces, Gizengists had moved in to take over the northeastern Congo, there was absolutely no question about the perilous position of the Europeans in that area, and the airlift was not a solitary United States operation. In any case, the events of 1960 to 1964 did not give the administration and ad infinitum right to intervene in the Congo without congressional sanction.

Mr. AIKEN. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. AIKEN. I might say there was quite a difference between sending troop carriers into the Congo 2 years ago and sending them a month ago. Two years ago they actually went in there to save a large number of people whose lives were threatened. There are people who have confided to me that the last time, a month or so ago, it is their belief that the troop carriers were sent into the Congo to save investments rather than people.

Mr. FULBRIGHT. I think the Senator makes a very good point.

Mr. AIKEN. I am not making a point. I am merely repeating what I was told.

Mr. FULBRIGHT. The Senator makes a distinction. There has always been an unexpressed policy when it came to saving lives of our citizens and we have on many occasions done that as an emergency operation without prior commitment.

I wish to cite an example that upset me more than any other during the past couple of years which arose out of a statement made by the Secretary of State on this subject. I want to quote it for the RECORD to show what I have in mind.

On January 28, 1966, Secretary Rusk, during the hearings on Vietnam, was asked: Are we obligated to do this—he was referring to what we are doing in Vietnam—under the SEATO Treaty?

He replied that, in addition to the SEATO Treaty:

We have bilateral assistance agreements with South Vietnam. We have had several actions of the Congress. We have had the annual aid appropriations in which the purposes of aid have been fully set out before the Congress. We

have had special resolutions such as the one of August, 1964, and we have had the most important policy declarations by successive Presidents with respect to the protection of South Vietnam against Communist aggression.

Without quarreling with the reference to SEATO or the congressional resolution of August 1964, this is a very significant statement, it seems to me, because of its casual reference to other acts. Thus, so far as I know, none of the bilateral assistance agreements referred to has ever been submitted to the Congress. They were quite informal executive agreements signed, I presume, by our ambassador or Secretary, and a representative of the South Vietnamese Government. I do not think they should be considered national commitments—if that is the proper word—commitments which involve the use of our Armed Forces in Southeast Asia.

The Secretary of State went on to refer to annual aid authorizations as if they were indications of national commitments.

Certainly, those aid authorizations were not considered in the context of sending U.S. troops. Having participated in aid bills year after year, I realize that they contain policy statements which no one takes too seriously. They usually express a hope. This year, incidentally, the committee was wise in striking most of these policy statements from the bill. We do not want them to be used as excuses for future commitments. We did that in the Committee, and I hope the Senate will sustain that action.

So to consider the annual aid authorizations as remotely authorizing the making of commitments for the use of American Armed Forces in a country receiving aid is, it seems to me, rather farfetched. But this is the kind of problem I have in mind that the committee should examine and endeavor to make it very clear, for the information of the Executive and everybody in the future, that we are not to consider this type of action as authorization for carrying on war, sending troops, or anything of that kind.

The Secretary mentioned "Policy declarations by successive Presidents," as a source of commitment. That is a very broad statement. There have been many policy declarations in speeches on the Fourth of July, on many occasions, or on a visit of a dignitary from a foreign country. They are often referred to as commitments. This is the type of thing I wish to clarify.

On January 3, 1966, the Department of State issued its 14 points. Under the heading "The U. S. Commitment," there appears the following:

The United States has a clear and direct commitment to the security of South Vietnam against external attack. This commitment is based upon bilateral agreements between the United States and South Vietnam.

This is a reiteration of the same point I read previously. None of these was approved by the Congress—

and upon annual actions by the Congress in providing aid to South Vietnam—

The same statement was made by the Secretary of State—and, continuing the quotation from the State Department publication of January 3, 1966:

This commitment is based * * * upon the policy expressed in such Congressional action as the August 1964 resolution, and upon the solemn declarations of three U.S. presidents. At stake is not just South Vietnam, nor even Southeast Asia, there is also at stake the integrity of U.S. commitment and the importance of that commitment to the peace right around the globe.

Let me interject that my point is not directly related to Vietnam, but rather to the methods by which we seem to involve the Nation in a commitment.

On August 20, 1965, in a State Department publication entitled "Why Vietnam?" the following statement appears:

The Roots of Commitment

In the historic documents that follow, *two American Presidents define and affirm the commitment of the United States to the people of South Vietnam.*

In letters to Prime Minister Churchill in 1954 and to President Diem in 1954 and 1960, President Eisenhower describes the issues at stake and pledges United States assistance in South Vietnam's resistance to subversion and aggression.

And in December 1961 President Kennedy reaffirms that pledge.

The Eisenhower letters referred to in this statement contain the following language:

To Churchill, April 4, 1954, referring to the need for a Southeast Asia coalition of the United Kingdom, the United States, France, Australia, New Zealand, Thailand and the Philippines: ". . . The important thing is that the coalition

must be strong and it must be willing to join the fight if necessary. *I do not envisage the need of any appreciable ground forces on your or our part. . .*"

That is the end of the quotation from that letter to Churchill.

Then the letter to President Diem from Eisenhower on October 1, 1954, stated:

The purpose of this offer—"an intelligent program of American aid") is to assist the Government of Vietnam in developing and maintaining a strong viable state, capable of resisting attempted subversion or aggression through military means . . .

Then, the letter from President Eisenhower to President Diem on October 26, 1960, stated:

Although the main responsibility for guarding that independence will always, as it has in the past, belong to the Vietnamese people and their government, I want to assure you that for so long as our strength can be useful, the United States will continue to assist Vietnam in the difficult yet hopeful struggle ahead.

These are given in illustration of the type of thing I have in mind in bringing this resolution to the attention of the Senate. And let me reiterate—it is this technique of broadening statements and letters into national commitments that is disturbing.

Mr. President, I shall not delay this matter further. I ask unanimous consent to have printed at this point in the RECORD, an excerpt from a speech of the Secretary of State on February 16, 1966, before the National Convention of the National Rural Electric Cooperative Association, at Las Vegas, Nev., calling attention to his expression of our commitment in the speech at that time.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

Both Peiping and Hanoi have proclaimed South Viet-Nam to be a critical test for the so-called "war of liberation".

We are committed to assist South Viet-Nam to resist aggression by the SEATO Treaty, which was approved by the Senate with only one dissenting vote; by the pledges of three successive Presidents; by the aid approved by bipartisan majorities in Congress over a period of 12 years; by joint declarations with our allies in Southeast Asia and the Western Pacific; and by the Resolution which Congress adopted in August 1964, with only two dissenting votes.

I also ask unanimous consent to have printed in the RECORD an excerpt from a Department of State bulletin of March 14, 1966, entitled "Vice President Reviews Asian Problems with Thai Premier." The excerpt includes a communique which the Vice President issued on his visit to Bangkok, and shows clearly how general statements become national commitments without collaboration with the Congress.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

VICE PRESIDENT REVIEWS ASIAN PROBLEMS WITH THAI PREMIER

Vice President Humphrey was in Thailand February 13-15 during a special mission to Asia for President Johnson.¹ Following is the text of a joint communique released at Bangkok on February 15 at the conclusion of talks between the Vice President and the Prime Minister of Thailand, Thanom Kittikachorn.

The Vice President of the United States and the Prime Minister of Thailand have concluded a most useful discussion and review of the common struggle against Communist aggression in Southeast Asia, including the results of the recently concluded conference in Hawaii.²

The Vice President paid tribute to the strong and unhesitating stand which Thailand and her leaders have taken against the many forms of Communist aggression, the disguised as well as the blatant ones. He expressed the gratitude of his Government for Thailand's initiatives in seeking a larger regional framework for the peaceful achievement of social and economic progress. He emphasized the determination of the United States to provide all necessary assistance to enable Thailand and the other countries of Southeast Asia threatened by Communist aggression to defend themselves and to achieve in peace their just economic and social aims.

¹ Alexis de Tocqueville, *Democracy in America*, Vol. I (New York: Alfred A. Knopf, 1945), p. 265.

² Edwin S. Corwin, *The President, Office and Powers, 1787-1948, History and Analysis of Practice and Opinion* (New York: New York University Press, 1948), p. 208.

The Prime Minister concurred with the principle underlying the Declaration of Honolulu: that the war in Southeast Asia must be waged on two fronts simultaneously—the military front and the struggle to improve the social, economic, and physical well-being of the people.

Recognizing Thailand's commitment to defend itself against Communist aggression both from within and from without, the Vice President reaffirmed the United States pledge to assist in programs for the improvement of individual well-being and security in Thailand. Despite the progress already made in the development of rural areas, a need was clearly identified for greater efforts to provide more ample water supply, further expansion of rural credit for agriculture and related small industry, irrigation of farmlands, expansion of rural electrification, an expanded road system to connect outlying areas to markets, better medical care extended to presently isolated villages, and the provision of more schools to educate the populace and to insure that they will be better equipped to share in the progress of their country and contribute to its strength and stability.

It was agreed that the steps taken to improve the security in certain areas had proved their worth, but that further strengthening of security forces was an urgent necessity. Both Governments would provide additional resources to achieve this end, so that villages would be freed from the threat of Communist terrorism and harassment. At the same time further assistance beyond ongoing programs for the improvement and modernization of the Thai Armed Forces was a pressing requirement which would be met by the United States with the flexibility and promptness required by the current emergency.

Thailand's present contributions in regional affairs were jointly reviewed with specific reference to the constructive role Thailand has played in the Mekong Committee, its leadership in the recent regional educational conference, its strong support for the Asian Development Bank,³ and leadership in forming a highly competent regional council for exchange and coordination of development plans. The Prime Minister stressed the need for Asian initiative and innovation in achieving more rapid progress in economic development so as to improve the lives of the Asian peoples. This is one of the objectives underlying the renewed interest in the Association of Southeast Asia. The Vice President recalled President Johnson's pledge in April 1965⁴ of a \$1 billion American contribution to such a program following its organization by Asian leadership. In this context the Vice President noted the visit of Mr. Eugene Black for discussions with the Prime Minister,⁵ which have resulted in the necessary engineering or other survey actions for all the 13 projects proposed by the Prime Minister.

It was agreed that organizations such as the Association of Southeast Asia could play a valuable role in fostering new cooperative institutions and stimulating the ideas that would make dramatic economic transformations possible.

Mr. President, I conclude by stating that I appreciate very much the expressions of support which have been given me by my fellow Senators.

Mr. ELLENDER subsequently said: Mr. President, I was quite busy this afternoon holding hearings in the Subcommittee on Public Works. I was very anxious to be present when the Senator from Arkansas [Mr. FULBRIGHT] submitted his resolution on commitments.

Following my trip to Africa in 1962, I pointed out to the Senate that the State Department, without any sanction from Congress or anybody else, bound us to a contribution of \$225 million to Nigeria without consulting anyone.

This was done on November 24, 1962, and my visit there was in August, I believe, of 1962.

In 1962 I also discovered in Tunisia that the State Department, or someone from the State Department, had bound us to a \$180 million commitment.

I also discovered that the State Department had bound us to a commitment of \$390 million to the United Arab Republic.

I also found that grants had been made to Trinidad in the amount of \$30 million.

Recently someone agreed to let Korea have \$150 million in development

³ Ruhl Jacob Bartlett, *American Foreign Policy: Revolution and Crisis*, Oglethorpe Trustee Lecture Series, Oglethorpe College, Atlanta, Georgia, May 1966, Lecture One, pp. 21-22.

¹ For background, see BULLETIN of Feb. 28, 1966, p. 302.

² *Ibid.*

³ For background, See *ibid.*, Mar. 7, 1966, p. 379.

⁴ *Ibid.*, Apr. 26, 1965, p. 606.

⁵ For background, see *ibid.*, Aug. 2, 1965, p. 215.

loans. There was also an agreement to let South Vietnam have 750,000 tons of rice for the crop year 1967-68.

All this was done without consulting Congress or anybody connected with the Appropriations Committee.

I am very hopeful that the resolution that the Senator from Arkansas has submitted will cover these situations and that it will not be possible in the future for the President, the State Department, or any other department to bind Congress with respect to such large appropriations without consulting those who have to vote and hold hearings on the appropriation of these enormous amounts of money.

[Statement of April 25, 1972]

VIETNAM—MISSUNDERSTOOD UNDERSTANDINGS
(Senator Stuart Symington)

In testimony before the Senate Foreign Relations Committee on April 17 and 18, the Secretaries of State and Defense placed great emphasis on what they characterized as violations by the North Vietnamese of "understandings" which had been arrived in discussions between representatives of the United States and North Vietnam in Paris in September and October, 1968. It was in these discussions that the groundwork was laid for the total cessation of United States bombing of North Vietnam, as announced by the previous Administration on October 31, 1968; and the subsequent expansion of the Paris talks to include representatives of the Saigon Government and the National Liberation Front.

Since October, 1968, there has been continuing public controversy concerning the nature and particulars of these "understandings." Both the United States and North Vietnam have charged the other with not having lived up to whatever was agreed or "understood" in the course of the September-October, 1968, talks in Paris; and both sides have now placed their own selected and fragmentary versions of those talks before the public.

The most recent instance of this was the release by the North Vietnamese delegations in Paris on April 20 of a document describing the 1968 negotiations and containing selected quotations from the "minutes" of the 1968 discussions; and the effect of this North Vietnamese action has been to complicate further the question of determining what was or was not said or "understood" in 1968.

Because both sides have now made an issue of the 1968 discussions, and because this issue is central to current actions being taken by the United States, as well to the prospect for possible future negotiations, it is clear that the full record of these talks should now be made available to the public.

During his testimony before the Foreign Relations Committee on April 18, Secretary of Defense Laird expressed the view that the "minutes" of the 1968 discussions should be available to anyone to read. He added that the Committee had already been given the "minutes" by the Executive Branch; while we are convinced the latter statement was made in good faith, it was nevertheless erroneous.

Given Secretary Laird's view that both the Committee and the public should have the record of the meetings, we are hopeful that steps can now be taken to promptly make public the full record of the 1968 talks.

Toward that end, we have spoken to both Secretary Laird and Secretary Rogers, and have written to them urging that the minutes of the 1968 discussions be transmitted to the Committee; also that they be promptly declassified. In addition, I have asked the Secretary of State to declassify the transcripts of background briefings which were held by high Executive Branch officials on the evening of October 31, 1968.

These meetings with the press were obviously held to explain to the public, via the news media, the basis on which the United States agreed to stop its bombing of North Vietnam and on which the North Vietnamese agreed to expanded peace talks. As such, they provide an invaluable insight into the content of United States policy at the time.

At present, the Committee on Foreign Relations has copies of the two back-grounders in question, both of which bear a "confidential" security classification. It is impossible to justify any such classification, however, in view of the fact that documents in question are a record of conversations between public officials no longer in office and members of the press representing the public. This situation should be corrected at the same time the minutes are released. In this way the public will be able to gain a full understanding of what its responsibilities thought was being "understood" in October, 1968.

In calling upon the Executive Branch to take these actions, we are not prejudging any of the issues involved, implying any criticism of the manner in which the 1968 discussions were handled, or the manner in which they are now being interpreted. Rather we are pursuing the fundamental right of the Congress to know the facts, so they in turn can participate in an informed manner in the formulation of policies which profoundly affect the security and welfare of this nation.

DEPARTMENT OF STATE,
Washington, D.C., April 10, 1972.

HON. SAM J. ERVIN, JR.,

Chairman, Subcommittee on Separation of Powers, U.S. Senate, Washington D.C.

DEAR MR. CHAIRMAN: I refer to your letter of March 10, 1972, requesting an updating of the analysis embodied in the compilation entitled "International Agreements Other Than Treaties 1946-1968: A List With Citations of Their Legal Bases" which was prepared in the office of The Legal Adviser in response to your request.

In the acknowledgment addressed to you by the Acting Legal Adviser, Mr. Carl F. Salans, on March 17, 1972, you were informed that the research necessary to assemble the information desired was being conducted and that the information would be sent to you at the earliest possible time.

I enclose an Addendum to the above-mentioned compilation to cover the period to April 1972.

Please continue to call on us whenever you believe we might be helpful.

Sincerely yours,

JOHN R. STEVENSON, *Legal Adviser.*

APRIL 20, 1972.

HON. SAM J. ERVIN, JR.,

Chairman, Subcommittee on Separation of Powers, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I have received your letter of April 4, 1972, in which you refer to a statement in the Foreword of the Department's publication *Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 1972* concerning, among other things, agreements made "under and in accordance with the President's Constitutional power." You request information as to which of the agreements listed in the publication were made under that authority and inquire specifically under what legal or Constitutional authority each of the agreements was made.

I believe that material heretofore sent to you presents information of the kind which you desire, not only with respect to agreements in force on January 1, 1972, as listed in the publication to which you refer, but with respect to all international agreements other than treaties entered into since 1945. On January 17, 1969, in reply to a letter from you dated September 20, 1968, there was sent to you by Mr. Leonard C. Meeker, The Legal Adviser, a 290-page compilation dated January 10, 1969 and entitled "International Agreements Other Than Treaties 1946-1968: A List With Citations of Their Legal Bases", in which all such agreements were classified according to the legal authority on the basis of which they were made or became effective.

In a letter which you addressed to me on March 10, 1972, you requested an updating of the analysis embodied in the January 10, 1969 compilation. A 45-page addendum to cover agreements to April 1972 was completed on April 3, and was transmitted to you with a letter dated April 10, 1972. I understand you have now received those documents.

In the January 10, 1969 compilation, 4,926 agreements are classified in six categories according to their underlying authority: (A) prior legislation; (B) subsequent legislation; (C) legislation and treaty; (D) treaty; (E) partly legislation and/or treaty and partly constitutional authority; and (F) constitutional authority only. The material in the April 3 addendum is presented in the same format as the 1969 compilation.

The agreements in category (F) are listed on pages 261-273 of the 1969 compilation and pages 36-38 of the addendum. Each of the documents contains a tabulated year-by-year summary showing the totals in each of the six categories. The summary in the addendum (page 39) gives consolidated totals indicating that a total of 5,589 international agreements other than treaties made during the period 1946-April 1972, 64 are classified as "Constitutional authority only". Those agreements are grouped under 23 headings by subject matter, with citations of the relevant provisions of the Constitution in each case. In regard to 15 of the 23 subject headings, the citation is to section 1 of Article II of the Constitution relating to "executive Power" and in the other 8 cases, in addition to the citation of section 1, section 2 of Article II of the Constitution relating to the President's authority as "Commander in Chief" is cited since the agreements deal with matters pertaining to the Armed Forces. Similarly, in the case of the 376 agreements listed in category (E) on pages 186-260 of the 1969 compilation and pages 30-35 of the addendum, either section 1 or both sections 1 and 2 of Article II of the Constitution are cited in addition to various statutory or treaty citations.

The character and purposes of the agreements listed in category (F), i.e., agreements entered into in pursuance of, and deriving their effectiveness from, the authority and powers of the President under the Constitution, are indicated by the material given in the 1969 compilation and the addendum thereto. Reference should also be made to item 2 in the General Notes on page 1 of the 1969 compilation relating to "Exercise of constitutional authority".

It is the position of the Department that the President has the authority to enter into certain agreements solely on the basis of his independent constitutional powers. The pertinent provisions are contained in the following clauses of Article II of the Constitution:

"Section 1. The executive power shall be vested in a President of the United States of America. . . ."

"Section 2. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States; . . ."

"He shall have the Power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . ."

"Section 3. . . . [H]e shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed. . . ."

Since these are broad and general powers, the conclusion of a given agreement may involve more than one of them. For this reason, it is difficult to classify them more specifically than is done in the studies referred to above. However, the general character of the agreement-making authority derived from these various provisions can perhaps be summarized as follows:

Agreements concerning military matters are, of course, based at least in part on the President's power as Commander-in-Chief of the armed forces. This includes not only purely military matters, such as practical arrangements for co-operation with other nations in defense matters, but also, for example, agreements on conditions of armistice including the administration of occupied territory pending conclusion of a peace treaty.

The President's authority to conclude executive agreements may also derive from his treaty powers. Although he can make treaties only by and with the advice and consent of the Senate, it is the President alone who negotiates, and the process of negotiation may entail the conclusion of protocols, which represent stages in those negotiations, or a *modus vivendi* in limited terms designed to serve as a temporary measure pending conclusion of a treaty.

The power to "receive Ambassadors and other public Ministers" has been involved in, for example, the case of agreements incident to recognition of foreign governments, including such matters as the settlement of foreign claims.

The provision empowering the President to "take Care that all the Laws be faithfully executed" provides a basis for agreements designed to implement provisions of the Constitution, statutes, and treaties, as well as other international obligations of the United States.

More generally, and under the authority of the "executive Power" clause, the President acts as "the sole organ of the nation in its internal relations, and its sole representative with foreign nations." The normal conduct of foreign relations continually requires the conclusion of agreements of various sorts to compose differences with other governments, or regulate matters of mutual concern, and thus ensure the satisfactory continuation of diplomatic relations, these are the executive agreements which Professor Corwin has described as the "ordinary daily grist of the diplomatic mill."

While the powers referred to are obviously quite broad, I do not mean to suggest that the President has independent constitutional authority to conclude all agreements on these subjects without limitation. The President's power is certainly subject to the express restrictions and prohibitions of the Constitution. Moreover, the President's responsibility in many of these areas is shared with the Legislative Branch, and his authority in such matters depends in some measure on whether and in what manner Congress has previously acted with respect to the specific subject matter involved.

If I can be of any further assistance, please to not hesitate to call on me.

Sincerely,

JOHN R. STEVENSON, *Legal Adviser.*

[Excerpts from International Agreements Other Than Treaties 1946-1968: A List with Citations of Their Legal Bases, Department of State, Jan. 10, 1969]

CITATIONS OF AGREEMENTS MADE UNDER THE PRESIDENT'S CONSTITUTIONAL AUTHORITY

F. CONSTITUTIONAL AUTHORITY ONLY

(Note: Under this heading are agreements entered into in pursuance of, and deriving their effectiveness from, the authority and powers of the President under the Constitution. See also note number 2 under the General Notes, page 1.)

Armistice or surrender

Note: TIAS 2781 is a Joint Policy Declaration by "the United Nations Members whose military forces are participating in the Korean action" supporting the decision of the Commander-in-Chief of the United Nations Command to conclude an armistice agreement. TIAS 2782 contains the "Agreement Between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, concerning a military armistice in Korea" and contains also a temporary supplemental agreement.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—3, 1953—3, TIAS 2781 (Multilateral), 2782 (Korean People's Army and Chinese People's Volunteers, 2 agreements).

Brazil—maritime transportation—consultations

Note: This agreement establishes procedures for direct communication between the authorities of the two Governments for the "exchange of points of view and the adoption of appropriate measures on common problems of maritime transportation." The authorities to participate in the consultations are specified. "In the case of the United States, for this purpose, they are the Department of State, and, in appropriate cases, depending upon the matters under consideration, the Department of Transportation, the Maritime Administration, and the Federal Maritime Commission." It is provided further: "In case any measures agreed upon are of such character that might require decisions on higher level, the maritime authorities shall make the necessary recommendations to their respective Governments."

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power"). See also laws relating to the powers and duties of the respective departments and agencies: Secretary of State—5 U.S.C. 156; Department of Transportation—49 U.S.C. 1651 et seq.; Maritime Administration and Federal Maritime Commission—5 U.S.C. 597, 599; Reorganization Plan No. 21 of 1950, effective May 24, 1950, 15 FR 3178, 64 Stat. 1273 (amended by Plan, No. 7 of 1961, see below); 46 U.S.C. 1111 note, Reorganization Plan No. 7 of 1961, effective August 12,

1961, 26 FR 7315, 75 Stat. 840, as amended by P.L. 88-426, August 14, 1964, 78 Stat. 425.

(b) *Agreements*.—1. 1968.—1 TIAS 6559 (Brazil).

Canada—sewage disposal system

Note: In this exchange of notes the United States requested, and Canada granted, approval for the United States Government to construct a sewage line to connect the United States border station at Dunseith, North Dakota, to the sewage disposal system owned by Canada on the Canadian side of the border. Approval to construct the line was sought because the sewage disposal system at Dunseith was inadequate and local soil conditions made enlarging it prohibitively expensive.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—1. 1966.—1 TIAS 6037 (Canada).

Canada—trade and economic policy—joint committee

Note: TIAS 2922 merely designates a joint committee consisting of the United States Secretaries of State, Treasury, Agriculture, and Commerce and their Canadian counterparts, such committee to meet once a year or more often, as necessary, to consider matters affecting harmonious economic relations and to exchange information and views. The committee is to report to the respective Governments so that consideration may be given to measures to improve relations and encourage the flow of trade. The 1961 agreement in TIAS 5448 modifies the 1953 agreement by including the Secretary of the Interior on the United States membership of the United States-Canadian Committee on Trade and Economic Affairs on a permanent basis due to the "great and growing interest in matters concerned with the development and exchange of energy resources". The agreement provides for consultation and cooperation between the two countries in this field. The 1963 agreement in TIAS 5448 modifies the 1953 agreement by including the Canadian Minister of Industry on the Committee on a permanent basis.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—3. 1953.—1 TIAS 2922 (Canada). 1961.—1 TIAS 5448 (Canada). 1963.—1 TIAS 5448 (Canada).

Claims—requisitioning of SS Marechal Joffre

Note: By this agreement France agrees to pay all cargo claims arising out of the requisitioning during war of the *SS Marechal Joffre*, obtaining a release in favor of the United States Government and indemnification of the United States against any loss arising out of the goods involved in the claim. Australia will pay to France the net proceeds from disposition of cargo unloaded in Australia. Payments made as to claims of United States citizens will be paid by France in United States dollars. Australia waives any further claim against the United States Government arising out of the requisitioning of the vessel and the unloading of cargo in Australia.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—1. 1948.—1 TIAS 1816 (France and Australia).

Claims—sinking of Awa Maru—Japanese waiver

Note: While acknowledging United States Government responsibility for the sinking of the Japanese passenger-cargo vessel AWA MARU on April 1, 1945, and expressing regret, the agreement provides that the Japanese Government "waives on behalf of itself and all Japanese nationals concerned all claims of any description against the United States Government or any United States national arising out of the sinking of the *Awa Maru*". This waiver is given by Japan "mindful of the equities of the situation as they have developed since the inception of the occupation of Japan under General of the Army Douglas MacArthur and in appreciation of the assistance—direct and indirect, in goods and services—received during the post-surrender period from the Government of the United States of America". This waiver by Japan is accompanied by an understanding that occupation costs and loans and credits extended to Japan by the United States are valid debts owed by Japan, reducible only by United States decision. In Article 19 of the Treaty of Peace (TIAS 2490), Japan waived all claims arising out of the war and occupation.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—1. 1949.—1 TIAS 1911 (Japan).

Defense—armed forces, United States—presence in foreign countries

Note: These agreements confirmed that United States armed forces remaining in the foreign country were "so stationed with the full and freely given consent of" that foreign country. The agreements were made in order to eliminate any question regarding conformity with paragraph 7 of a United Nations Resolution on the Principles Governing the General Regulation and Reduction of Armaments, adopted by the General Assembly on December 14, 1946 pursuant to its authority under the United Nations Charter of June 26, 1945 (TS 993, 59 Stat. 1031). The cited paragraph 7 expresses the principle that armed forces of one country should not be or remain in another country without the full and freely given consent of such other country.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—2. 1947.—2. TIAS 1663 (Guatemala), 1715 (China).

Defense—Denmark—Greenland defense projects

Note: This agreement establishes a United States-Danish Committee on Greenland Projects for the exchange of information and consultation. An existing Project Commission was to continue functioning in regard to construction, operation, and manning of Distant Early Warning (DEW) Stations in Greenland until construction and installation of the DEW Line Stations had been completed; then the function was to be transferred to the Committee.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—1. 1960.—1. TIAS 4657 (Denmark).

Dominican Republic—external debt—treaty termination

Note: This agreement records the understanding of the two Governments that, since funds sufficient for full redemption of outstanding bonds and accrued interest of Dominican external debts of 1922 and 1926 had been deposited in trust for redemption, and all other obligations under the Convention of 1940 had been extinguished, the Convention, with accompanying exchange of notes, had terminated automatically, by its terms, on October 1, 1947.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power"). See also Convention (treaty) of September 24, 1940 modifying the Convention of December 27, 1924 providing for the assistance of the United States in the collection and application of the customs revenues, TS 965, 55 Stat. 1104.

(b) *Agreements*.—1. 1951.—1. TIAS 2365 (Dominican Republic).

Germany—Berlin blockade and east-west zones restrictions

Note: This agreement brought about the end of the so-called Berlin Blockade and of restrictions imposed on communications, transportation, and trade between Berlin and the Eastern and Western Zones and between the Eastern and Western Zones. The agreement is dated May 4, 1949, ending restrictions as of May 12.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—1. 1949.—1. TIAS 1915 (Multilateral: France, United Kingdom, Union of Soviet Socialist Republics).

Haiti—external debt—payments on outstanding bonds

Note: These agreements were part of a series formalizing procedures by which Haiti would liquidate its external debt, especially as to bonds held by United States citizens. Agreements continued from year to year an arrangement whereby all receipts of Haiti would be deposited in a Bank which would make payments provided for by loan contracts of 1922 and 1923 and whereby Haiti agreed to pay a specified sum on account of amounts required to be paid under those contracts for amortization, the United States at length agreeing to the floating of an internal loan by the Haitian Government for redemption of the bonds. The history goes back to the situation that led to the Treaty of 1915 with Haiti (TS 623, 39 Stat. 1654), which expired on May 3, 1936, and under which the United States undertook to assist Haiti in remedying condition of its revenues and finances and in carrying out plans for economic development of Haiti. Beginning in 1933, the United States and Haiti entered into agreements extending and modifying on a year-to-year basis the arrangements for placing Haitian fiscal functions on a sound base and ensuring continuance of efficient procedures for final settlement of the Haitian debt under the loan contracts.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—4. 1946.—2. TIAS 1521 (Haiti), 1599 (Haiti). 1947.—2. TIAS 1643 (Haiti), 1862 (Haiti).

Korea—occupation by U.S. forces—termination

Note: This agreement deals with interim military and security measures pending completion of withdrawal of United States Forces in 1948.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—1. 1948.—1. TIAS 1918 (Korea).

Maritime matters—naval vessels—deployment for repairs

Note: These agreements relate to the deployment of United States naval vessels for the purpose of making repairs and serving as repair vessels and to the granting of permission for entry of the vessels into ports or harbors of the other country.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—6. 1966.—4. TIAS 5956 (Malta, repair ship USS *Cadmus* and other naval vessels), 5980 (Malta, amendment of TIAS 5956), 6064 (Malta, USS *Shenandoah*), 6201 (Malta, USS *Cascade*). 1967.—1. TIAS 6310 (Malta, USS *Yellowstone*). 1968.—1. TIAS 6480 (Malta, USS *Cadmus*, *Shenandoah*, *Cascade*, and *Yellowstone*), 6565 (Malta, USS *Everglades*).

Maritime matters—naval vessels—visits

Note: These agreements formalize principles and procedures to apply regarding the treatment to be accorded when naval vessels of one of the countries visit the other country.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—6. 1949.—1. TIAS 2965 (Cuba). 1950.—1. TIAS 2965 (Cuba). 1951.—1. TIAS 2965 (Cuba). 1952.—1. TIAS 2965 (Cuba). 1953.—1. TIAS 2965 (Cuba). 1954.—1. TIAS 2965 (Cuba).

Marriage—documentary requirements in Italy

Note: This agreement simplifies the procedures whereby United States citizens comply with Italian law concerning documentary evidence and requirements for marriage.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—1. 1964.—1. TIAS 6239 (Italy).

Treaties—territorial application—dependencies and new states

Note: It has long been recognized that many treaties and other international agreements which have been applied in accordance with their terms to dependent territories may be considered as continuing to apply to such territories upon their emergence to independence as new states, subject in most instances to the acceptance, tacit or otherwise, of such continuation by the parties concerned (e.g., the United States and the new states). The same situation has existed where a federated dependent territory has been divided into two or more dependent territories (as in the case of the Federation of Rhodesia and Nyasaland, which became Southern Rhodesia, Northern Rhodesia, and Nyasaland). In some cases, it has been considered expedient to exchange diplomatic communications in which the understanding is confirmed with respect to the continuing application. With respect to certain treaties between the United States and the United Kingdom, there have been exchanges of communications with Botswana, Ghana, Kenya, Lesotho, Malawi, and Tanzania, and also an exchange of communications with the United Kingdom in regard to Southern Rhodesia, Northern Rhodesia, and Nyasaland. With respect to certain treaties between the United States and France, there has been an exchange of communications with the Republic of the Congo, Brazzaville. These exchanges do not involve any new commitment.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—9. 1958.—1. TIAS 4966 (Ghana). 1961.—1. TIAS 5161 (Rep. of the Congo, Brazzaville). 1963.—1. TIAS 5501 (United Kingdom). 1965.—2. TIAS 5916 (Kenya), 5946 (Tanzania). 1966.—2. TIAS 6165 (Botswana), 6192 (Lesotho). 1967.—2. TIAS 6328 (Malawi), 6383 (Lesotho).

Treaties—texts—correction or interpretation

Note: In a few instances, texts of treaties as prepared for signature have contained errors of a typographical character. In the cases of bilateral treat-

ies, it has been possible for the United States and the other country concerned to exchange notes confirming the understanding with respect to the correction of the errors. In the case of a multilateral treaty, a "procès verbal of rectification" of similar document was adopted. With respect to the 1951 security treaty with Japan and the 1952 administrative agreement under Article III of that treaty, the United States and Japan exchanged notes in 1957 to confirm the understanding that they "were so drafted as to be fully compatible with the obligations contained in the United Nations Charter" and were to be so interpreted. The treaties to which references are made below, in the order in which listed, are:

Estate-tax convention of February 20, 1950 with Greece, TIAS 2901, 5 UST 12;

International Convention on the Safety of Life at Sea, 1948, opened for signature at London June 10, 1948, TIAS 2495, 3 UST 3450;

Security Treaty of September 8, 1951 with Japan, TIAS 2491, 3 UST 3329, and administrative agreement under Article III of that Treaty, TIAS 2492, 3 UST 3341;

Income-tax convention of February 20, 1950 with Greece, TIAS 2902, 5 UST 47;

International Convention for the Safety of Life at Sea, 1960, done at London June 17, 1960, TIAS 5780, 16 UST 185;

Extradition Convention of December 10, 1962 with Israel, TIAS 5476, 14 UST 1707.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—6. 1954.—1. TIAS 3032 (Greece, correction of text of estate-tax convention). 1955.—1. TIAS 3590 (Multilateral, notification in 1953 by the United Kingdom regarding a correction of error in the text of the regulations annexed to the Safety of Life at Sea Convention, acknowledged and accepted by the United States in 1955). 1957.—1. TIAS 3910 (Japan, interpretation of Security Treaty and administrative agreement). 1961.—1. TIAS 4951 (Greece, correction of text of income-tax convention). 1966.—1. TIAS 6284 (Multilateral, procès verbal of rectification of certain annexes to the Safety of Life at Sea Convention). 1967.—1. TIAS 6246 (Israel, correction of text of Extradition Convention).

Viet Nam—income-tax administration

Note: This agreement relates to certain aspects of Viet Nam income-tax administration as it affects the liability of United States Government employees in Viet Nam. It recognizes certain principles, including the personal responsibility of all citizens to meet their tax obligations to their own government, the legal inapplicability of Viet Nam's tax-withholding requirements to foreign diplomatic missions, and the absence of authority under United States law for the United States Government compulsorily to withhold amounts from compensation of its employees for settlement of their tax obligations to Viet Nam. The agreement then establishes a procedure whereby the United States will, "within the limits of United States law," cooperate in facilitating payment by its "liable employees" of their tax obligations to Viet Nam. An allotment system is established whereby, on a wholly voluntary basis, United States Government employees liable for Viet Nam income tax may make biweekly allotments from their compensation and permit the United States Government to remit the allotted sums to the Viet Nam Government. Determination of taxes due and either settlements of liability in addition to allotted sums or refunds for overpayments "will be a matter between the individual employee/taxpayer and the Government of Viet Nam."

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power"). See also 26 U.S.C. 3404.

(b) *Agreements*.—1. 1967.—1. TIAS 6262 (Viet Nam).

[Excerpts from Addendum to The Compilation of January 10, 1969. Entitled "International Agreements Other than Treaties 1946-1968 Classified According to the Legal Authority On the Basis of Which They Were Made or Became Effective" To Cover the Period to April 1972]

F. CONSTITUTIONAL AUTHORITY ONLY

(Note: Under this heading are agreements entered into in pursuance of, and deriving their effectiveness from, the authority and powers of the President under the Constitution. See also note number 2 under the GENERAL NOTES, page 1 of the January 10, 1969 compilation.)

Diplomatic status—recognition of—commercial section of embassy—New York branch

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—2. 1967.—10 TIAS 6771. (Czechoslovakia). 1969.—1. TIAS 6772 (Hungary).

Diplomatic status—recognition of—language and area studies—personnel

Note: This agreement confirms that the Foreign Service Institute School of Language and Area Studies at Teichung will be known as the American Embassy School of Chinese Language and Area Studies and will be considered part of the American Embassy, and the U.S. personnel of the School will have status and privileges of administrative and technical personnel of the Embassy. Also, Chinese Government personnel assigned to the Chinese Embassy in Washington for study at universities in the Washington area and at the University of Maryland, will have status and privileges of administrative and technical personnel of the Embassy.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—1. 1969.—1. TIAS 6759 (China).

Japan—reversion of Okinawa—preparatory measures

Note: This agreement confirms that the Japan-United States Consultative Committee in Tokyo should undertake preparatory work, with a Preparatory Commission to consult and coordinate locally on measures regarding preparation for transfer of administrative rights, including necessary assistance to the Government of the Ryukyu Islands.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—1. 1970.—1. TIAS 6838 (Japan).

Maritime matters—naval vessels—deployment for repairs

Note: See note under this heading in the January 10, 1969 compilation.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—3. 1969.—1. TIAS 6740 (Malta). 1970.—2. TIAS 6870 (Malta), 7034 (Malta).

Nuclear war—measures to reduce risk

Note: This is an agreement to cooperate in undertaking to maintain and improve existing organizational and technical arrangements to guard against accidental or unauthorized use of nuclear weapons under the control of each country. The Direct Communications Link (see under the heading *Telecommunication—Hot Line With the Soviet Union* in category E in the January 10, 1969 compilation and under the same heading in category E in the present addendum) to be used in transmitting urgent information, notifications and requests for information in situations requiring prompt clarification.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power") and sec. 2 ("Commander in Chief").

(b) *Agreements*.—1. 1971.—1. TIAS 7186 (Union of Soviet Socialist Republics).

Philippines—customs—free entry privileges

Note: This agreement relates to free entry privileges in the Philippines for dependents of newly-assigned U.S. Government personnel assigned to South Viet Nam. This involves only permission given by the Philippine Government for duty-free entry of personnel's personal effects.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—1. 1965.—1. TIAS 6612 (Philippines).

Treaties—territorial application—dependencies and new states

Note: See note under this heading in the January 10, 1969 compilation.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—3. 1969.—1. TIAS 6744 (Singapore). 1970.—1. TIAS 6934 (Swaziland). 1971.—1. TIAS 7222 (Fiji).

Treaties—texts—correction or interpretation.

Note: See note under this heading in the January 10, 1969 compilation. The treaties to which references are made below are: Convention on International Civil Aviation, Chicago, December 7, 1944, TIAS 1591, 61 Stat. 1180. The Protocol referred to in connection with TIAS 6681 below is the Protocol on the

Authentic Trilingual Text of the Convention on International Civil Aviation (Chicago, 1944) which was signed at Buenos Aires on September 24, 1968, TIAS 6605, 19 UST 7693, and which is included in the present addendum under the heading *Treaties—Authentic Texts* in category E, International Convention on Load Lines, London, April 5, 1966, TIAS 6331, 18 UST 1857.

(a) *Authority*.—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*.—3. 1969.—3. TIAS 6629 (Multilateral, proces verbal of rectification of the Load Line Convention), 6681 (Multilateral, process verbal of rectification of the Protocol on the Civil Aviation Convention), 6720 (Multilateral, proces verbal of rectification of the Load Line Convention).

PART II.—ADDENDUM TO THE COMPILATION OF JANUARY 10, 1969 ENTITLED "INTERNATIONAL AGREEMENTS OTHER THAN TREATIES 1946-68 CLASSIFIED ACCORDING TO THE LEGAL AUTHORITY ON THE BASIS OF WHICH THEY WERE MADE OR BECAME EFFECTIVE" TO COVER THE PERIOD TO APRIL 1972

	Totals in the several categories on a year-by-year basis ¹						Totals
	A	B	C	D	E	F	
1955.....	1						1
1957.....	3						3
1958.....	1						1
1959.....	2						2
1961.....	1						1
1962.....	1						1
1963.....	1						1
1964.....	1	1					2
1965.....	1	1				1	2
1966.....	3				2		5
1967.....	9	1			1	1	12
1968.....	39		1		2		42
1969.....	138		8	4	5	7	162
1970.....	158		13		8	4	183
1971.....	184		7	2	19	2	214
1972 (to April).....	28		1	1	1		31
Totals.....	570	3	30	7	38	15	663
1946-68							
Totals given in January 10, 1969 tabulation.....	4,264	31	216	29	338	49	4,927
1946-April 1972							
Totals.....	4,834	34	246	36	376	64	5,590

¹ Categories:

- A. Prior legislation.
- B. Subsequent legislation.
- C. Legislation and treaty.
- D. Treaty.
- E. Partly legislation and/or treaty and partly constitutional authority.
- F. Constitutional authority only.

NUMBERS OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS CONCLUDED BY THE UNITED STATES DURING THE PERIOD JANUARY 1, 1946—APRIL 1, 1972

Year	Treaties	International agreements other than treaties	Year	Treaties	International agreement other than treaties
1946	19	139	1961	9	260
1947	15	144	1962	10	319
1948	16	178	1963	17	234
1949	22	148	1964	3	222
1950	11	157	1965	14	204
1951	21	213	1966	14	237
1952	22	291	1967	18	223
1953	14	163	1968	18	197
1954	17	206	1969	6	162
1955	7	297	1970	20	183
1956	15	233	1971	17	214
1957	9	222	1972	7	31
1958	10	197			
1959	12	250			
1960	5	266	Total	368	5,590

DEPARTMENT OF STATE MEMORANDUM OF LAW REGARDING CONCLUSION OF
AGREEMENTS WITH PORTUGAL AND BAHRAIN

This memorandum describes the general practice of the Department of State in determining whether an agreement should be a treaty or an executive agreement and the standards which we apply in making such determinations. The memorandum then relates this practice and these standards to the exchange of notes on December 9, 1971 with Portugal regarding the continued use by American forces of certain facilities in the Azores and the exchange of notes on December 23, 1971 with Bahrain for the use of certain facilities in that country.

Both treaties and executive agreements have long been recognized as necessary and proper in the conduct of the foreign relations of the United States. The Department of State has a procedure, known as the Circular 175 procedure, which requires that the authorization of the Secretary of State be obtained before an international agreement may be negotiated or concluded. One of the purposes of the Circular 175 procedure is to make a determination as to the proper form of the agreement-treaty or executive agreement.

The regulations of the Department of State provide that an executive agreement may be entered into only if it falls within one or more of the following categories:

1. Agreements which are made pursuant to or in accordance with existing legislation or a treaty in force with respect to the United States;
2. Agreements which are made subject to Congressional approval or implementation;
3. Agreements which are made under and in accordance with the President's Constitutional powers.

The Legal Adviser's office is required to review all requests to the Secretary of State for authorization to negotiate or to sign any international agreement. The Legal Adviser's office examines the proposed agreement and the legal and constitutional authority for entering into it and specifically is required to show:

I. IN THE CASE OF A TREATY

- (a) Whether or not the subject matter is within traditional limits;
- (b) Whether or not the treaty will be self-executing, in whole or in part;
- (c) If not self-executing, the part or parts which may require legislation and the plans contemplated with respect to formulation and presentation of proposed legislation;
- (d) The extent, if any, to which the treaty is intended to prevail over existing Federal or State law and information as to groups in opposition to or in support of the contemplated change.

II. IN THE CASE OF AN EXECUTIVE AGREEMENT

(a) An extract copy of the pertinent legislative or treaty provisions, if any, constituting authority for the making of an Executive Agreement on the subject.

(b) If no antecedent legislative or treaty authority exists whether or not the agreement is to be made subject to legislation by the Congress.

(c) The Constitutional powers of the President relied upon.

The Department has other detailed standards which are followed in determining whether an international agreement should be concluded as a treaty. Under these standards, the treaty form is used:

a. When the subject matter and treatment thereof is traditionally handled by a treaty. This is not necessarily controlling in all instances but requires careful consideration before any departure therefrom.

b. When the subject matter and treatment thereof is not wholly within the delegated powers of the Congress and is not solely within the Constitutional authority of the President.

c. When the agreement itself is to have the force of law without legislative action by the Congress, and the action contemplated is not solely within the President's constitutional authority.

d. When the agreement involves important commitments affecting the nation as a whole.

e. When it is desired to give the utmost formality to the commitment with a view to requiring similar formality on the part of the other government concerned, in the interest of long continued respect for its terms.

Of course, it is not always possible to determine ahead of time the exact extent of the commitments that may be reached and it is sometimes necessary to await the outcome of the negotiations before making the final determination whether the new arrangement shall be a treaty to be submitted for the advice and consent of the Senate or an executive agreement for which there exists an adequate legal basis or for which legislative approval should be sought.

When considered in the context of the foregoing, conclusion of the agreements with Portugal of December 9, 1971, and with Bahrain, of December 23, 1971, as executive agreements is clearly appropriate.

Examination of the texts of the two agreements shows that neither involves any new policy on the part of the United States. Neither contains any defense or political commitments by the United States. To have concluded these agreements as treaties would have given them a formality which implied an importance and a U.S. commitment which are neither involved nor desired. Both agreements involve the granting to the United States of the right to use facilities for our vessels, aircraft or personnel and the governing of the status of our personnel. These matters have been traditionally handled by executive agreement and uniquely fall within the authority of the President as Commander in Chief under the Constitution. In the case of the Azores, the agreement is concluded pursuant to Article 3 of the North Atlantic Treaty. To the extent that the agreements involve the expenditure of funds by the United States, they are subject to the authorization and appropriation of funds by the Congress.

DEPARTMENT OF STATE MEMORANDUM OF LAW—PROCEDURES FOR IMPLEMENTING THE COMMITMENTS CONTAINED IN THE NORTH ATLANTIC TREATY

In the course of hearings held on February 1, 1972, before the Senate Committee on Foreign Relations concerning the recently concluded agreements relating to facilities for the stationing of United States forces in the Azores and Bahrain, a question was raised concerning the extent to which the commitments undertaken by the United States in the North Atlantic Treaty, particularly those contained in Articles 3 and 5, are self-executing. We understand the issue to be the extent to which these commitments may be implemented by the President, without further action by the Congress. This question is considered in the light of the executive agreement with Portugal relating to the Azores facilities.

I. IMPLEMENTATION OF NORTH ATLANTIC TREATY COMMITMENTS

Article 11 of the North Atlantic Treaty expressly provides that the decisions concerning the means by which particular treaty provisions are given effect by this country are to be made in accordance with the constitutional processes of the parties. With respect to each category of implementing action, therefore, the question of procedure must be answered in accordance with United States constitutional procedure.

Article 5. This is the operative article of the North Atlantic Treaty. It provides:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

No action to implement the commitments undertaken pursuant to this article is required unless and until the condition requiring such action comes into being—an armed attack against one of the parties in Europe or North America.

If this condition is fulfilled, the Treaty obligates each member to assist the party attacked. Such assistance is to be rendered individually and in concert. The nature of the assistance however, is not specified, and is left expressly to the discretion of the parties themselves, to be undertaken, as provided in Article 11, in accordance with their respective constitutional processes.

Various types of assistance may be envisioned. At the very lowest level, the United States could make diplomatic representations and issue statements condemning the attack. At a somewhat higher level of response, the United States could furnish arms and other material assistance to the party attacked. At the highest level, the United States could employ its own armed forces against the aggressor. The extent to which any of these actions would be undertaken by the President alone or would require Congressional authorization or approval would depend upon the respective powers of the President and the Congress under the Constitution.

As the Committee stated in its report to the Congress recommending approval of the North Atlantic Treaty:

Article 5 records what is a fact, namely, that an armed attack within the meaning of the treaty would in the present-day world constitute an attack upon the entire community comprising the parties to the treaty, including the United States. Accordingly, the President and Congress, each within their sphere of assigned constitutional responsibilities, would be expected to take all action necessary and appropriate to protect the United States against the consequences and dangers of an armed attack committed against any party to the Treaty. The committee does not believe it appropriate in this report to undertake to define the authority of the President to use the armed forces. Nothing in the treaty, however, including the provision that an attack against one shall be considered an attack against all, increases or decreases the constitutional powers of either the President or the Congress or changes the relationship between them.

Senate Executive Report No. 8, 81st Congress, 1st Session, p. 14.

Speaking more generally concerning this question, the Committee stated that: The committee wishes to emphasize the fact that the protective clause "in accordance with their respective constitutional processes" was placed in article 11 in order to leave no doubt that it applies not only to article 5, for example, but to every provision in the treaty. The safeguard is thus all-inclusive.

The treaty in no way affects the basic division of authority between the President and the Congress as defined in the Constitution. In no way does it alter the constitutional relationship between them. In particular, it does not increase, decrease, or change the power of the President as Commander-in-Chief of the armed forces or impair the full authority of Congress to declare war.

Except for the proposed foreign military assistance program, no legislation related to the treaty is presently contemplated or considered necessary. The treaty would constitute legislative authorization for our share of the expenses of the organization contemplated in article 9, but appropriations by Congress would be necessary. As the United States representatives on the council and the defense committee will have no authority to bind the United States Government, the committee believes that officials previously appointed with the confirmation of the Senate will not require further confirmation for these assignments.

Senate Executive Report No. 8, 81st Congress, 1st Session, pp. 18-19.

It will be observed from the statement in the first two of the above-quoted paragraphs that the treaty does not enlarge or impair any constitutional powers of either the President or the Congress. The third paragraph recognizes that application of the Treaty requires the exercise of some of the Constitutional powers of the Congress, particularly by the enactment of legislation. It necessarily follows that the President is also required to exercise his Constitutional powers in the application of the Treaty. The powers of neither branch of the Government are changed but implementation of the Treaty may necessarily involve actions by each within the sphere of its authority that would not be taken in the absence of the requirements of the Treaty.

Article 3. Although the basic "security commitment" provision of the North Atlantic Treaty is contained in Article 5, Article 3 is of great significance also. It provides:

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.

The actions taken pursuant to Article 3 must be taken, like those under Article 5, in accordance with the constitutional procedures of the parties. From the standpoint of the United States, the procedures to be followed depend upon the actions to be taken. They may involve the constitutional powers of both the President and the Congress. Certain joint arrangements undertaken pursuant to Article 3 can only be concluded by treaty, with the advice and consent of the Senate; the principal example of action of this type is the NATO Status of Forces Agreement (TIAS 2846), which contains various provisions altering federal and state legislation with respect to members of the armed forces of other NATO members who are stationed in the United States from time to time in connection with NATO affairs.

Other agreements, including agreements relating to the stationing of American forces in other countries, have traditionally been made by executive agreement. Such agreements effect no change in federal or state law; to the extent that they require authorizing legislation or appropriations to implement them, the agreements are made subject to the enactment of such legislation by the Congress. In every case, however, the necessary authorizing legislation has already been in existence, subject, of course, to the power in Congress to amend or repeal it. The United States has concluded executive agreements with every NATO country except Norway concerning the stationing of United States forces.

II. THE AZORES AGREEMENT

Under the terms of the letters signed by the Secretary of State on December 9, 1971, relating to assistance and credits for Portugal, the United States agrees, subject to the limitations of authorizing and appropriating legislation, to furnish certain grant assistance and certain credit opportunities to Portugal. Pursuant to the exchange of notes relating to facilities in the Azores, which was signed the same day, Portugal agrees to continue, in accordance with the Defense Agreement of 1951, to make facilities in the Azores available for the stationing of United States forces. The agreement does not differ significantly from other executive agreements concluded over a period of thirty years with other countries both before and after the conclusion of the North Atlantic Treaty. The agreement does not require the stationing of United States forces in the Azores, although it contemplates that they will be stationed there; the decision regarding stationing is made by the President, pursuant to his power as Commander-in-Chief of the military forces of the United States.

The legal authority for the conclusion of the Azores agreement consists of (1) the existing legislation pursuant to which the President is given the authority, subject to appropriations, to provide assistance to foreign countries, (2) the power of the President, as Commander-in-Chief, to arrange for the stationing of United States forces in accordance with the requirements of national security, and (3) the North Atlantic Treaty.

Under Article 3 of the North Atlantic Treaty, we have agreed to develop our individual and collective capacity to resist armed attack; where it appears that this purpose and the security of alliance members can be strengthened by the stationing of United States forces on the territory of another country, the President, in his capacity as Commander in Chief, has the power to carry out the Treaty by such a stationing of forces.

In the case of the Azores agreement, the Executive determined that nothing in the substance of the agreement imposed a legal or constitutional requirement that the agreement be submitted to the Senate for approval; thus, it could legally be concluded as an executive agreement. The Department further concluded that no other factors dictated the use of the treaty process for this agreement. Basing arrangements of this type have always been handled by executive agreement. The Azores agreement contains absolutely no new commitments to Portugal; it neither expands nor reduces the commitments undertaken to that country in the North Atlantic Treaty.

FRIENDSHIP AND COOPERATION

Agreement Between the
UNITED STATES OF AMERICA
and SPAIN

Signed at Washington August 6, 1970

with

Exchanges of Notes and Letters



NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89-497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113)—

“ . . . the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.”

SPAIN

Friendship and Cooperation

***Agreement signed at Washington August 6, 1970;
Entered into force September 26, 1970.
With exchanges of notes and letters.***

AGREEMENT OF FRIENDSHIP AND COOPERATION BETWEEN THE UNITED STATES OF AMERICA AND SPAIN

The Governments of the United States of America and Spain,
Conscious of the desires of their respective peoples for
peace, security and the maintenance of their independence, and
Recognizing that the security and integrity of each of the
two countries continues to be a matter of concern to the other,
and

Inspired by the purposes and principles of the Charter of
the United Nations, [1] and

Desiring to reaffirm and to further the friendship between
their peoples, in the spirit of the Treaty of Friendship and
General Relations signed at Madrid July 3, 1902, [2] and

Desiring to establish on a more comprehensive basis the
cooperation between the two Governments, which has been fostered
by such friendship, so that both Governments, through mutual
exchanges and support, may promote the well-being and progress
of their peoples, enabling them to meet effectively the
challenges of the modern world,

Have agreed as follows:

¹ TS 993; 59 Stat. 1031.

² TS 422; 33 Stat. 2105.

CHAPTER IGeneral Cooperation

Article 1. The Governments of the United States and Spain will continue their close cooperation and intimate working relationship, including regular mutual consultation by their Foreign Ministers, other members of the Governments, or their representatives, on all matters of common concern or interest, as deemed desirable by the two Governments.

Article 2. Such cooperation and relationship will be developed in those areas in which they have heretofore existed; in new areas deemed by the two Governments to require their urgent mutual attention, as specifically provided hereinafter; and in those other areas which the two Governments may consider appropriate in the future.

CHAPTER IIEducational and Cultural Cooperation

Article 3. In recognition of the importance of the cultural achievements of both countries, and in order to strengthen even more the friendship and understanding that traditionally have existed between their peoples, the Governments of the United States and Spain agree to expand their present exchanges in the educational and cultural fields, in number as well as in scope, subject to the constitutional processes and legislative requirements of the two countries.

Article 4. The expansion of these exchanges will involve teachers, research experts, scientists, scholars and students, and will extend into all branches of learning, especially natural and applied sciences, economics, and the language and culture of the two countries. In the field of arts and letters both Governments

will sponsor visits of authors and artists and the reciprocal dissemination of their works.

Article 5. Both Governments recognize the importance of the Fulbright-Hays program to promote educational and cultural exchanges between the two countries, and therefore they consider it desirable to expand the responsibilities of the Commission for Cultural Exchange between the United States of America and Spain established by the Agreement of October 16, 1958, and renewed by the Agreement of March 18, 1964. [1] The Spanish Government reaffirms its decision to contribute regularly to the financing of the Fulbright-Hays program.

Article 6. In its desire to cooperate with the Spanish Government in the expansion of the Spanish educational system and Spanish scientific and technical development, the Government of the United States, subject to United States legislation and the appropriation of funds by the Congress, will assist Spain in research, development, and advanced training of professors and other teaching personnel, particularly in the scientific disciplines, and training of new professors and other teaching personnel, and will provide documents, equipment, and materials for research laboratories and libraries as appropriate in the new Spanish universities and other centers of higher learning.

Article 7. In order to accomplish the goals of Article 6, the Government of the United States will consider with the greatest interest the specific programs that Spain presents to it in the fields mentioned in Article 6, and will cooperate in such programs, lending such assistance as the United States may provide subject to United States legislation and the appropriation of funds by the Congress. To the extent

¹ TIAS 4120, 4612, 5737; 9 UST 1311; 11 UST 2345; 15 UST 2446.

necessary and appropriate, these matters will be the subject of special agreements between the appropriate authorities of the two Governments.

Article 8. The two Governments consider it a matter of special interest to increase the knowledge of their respective languages in the two countries, by encouraging the activities of institutions and organizations that engage in the teaching of Spanish and the dissemination of Spanish culture in the United States, and at the same time encouraging the activities of institutions and organizations in Spain that carry on similar work with respect to the language and culture of the United States.

CHAPTER III

Scientific and Technical Cooperation

Article 9. Since science and technology are increasingly important for the development of a country, the Governments of the United States and Spain recognize that scientific and technical cooperation will be of great value in advancing the bonds of friendship, the state of the sciences and the resolution of the problems they share in common. Both Governments also recognize the desirability of devoting special attention to cooperation in the exchange of the results of scientific and technical research for their mutual economic and social benefits.

Article 10. Both Governments will undertake a broad program of scientific and technical cooperation for peaceful purposes.

Article 11. The cooperation between the two Governments will be based essentially on the following principles:

(a) Selection of specific scientific and technical sectors of major interest and yield.

(b) Preparation of plans for collaboration between research centers of the two countries.

(c) Programs for sending to Spain American professors and researchers of established reputation to cooperate in the advanced training of scientific and technological researchers.

(d) The establishment of appropriate channels for putting into operation, developing and supervising specific programs of scientific and technical cooperation.

Article 12. For the purposes of this Chapter, the two Governments consider the following areas, among others, to be of special interest:

(a) Civil uses of atomic energy, in accordance with the agreement of August 16, 1957, as amended. [1]

(b) The exploration and use of space, including inter-continental experiments with satellite communications, in accordance with the exchange of notes of September 18, 1964, and January 26, 1965; [2] spaceship tracking stations and operations, in accordance with the exchange of notes of April 14, 1966; [3] and the measurement of winds and temperatures at high altitudes, in accordance with the exchange of notes of April 14, 1966. [4]

(c) Marine sciences, including joint biological, physical and ecological projects to improve and increase the oceanic resources and their use.

(d) Medical and biological sciences, industrial technology, electronics and the social sciences.

Article 13. Any obligations arising pursuant to this Chapter shall be subject to the constitutional processes and legislative requirements of the respective countries.

¹ TIAS 3988, 5990; 9 UST 167; 17 UST 470.

² TIAS 5761; 16 UST 68.

³ TIAS 6003; 17 UST 570.

⁴ TIAS 5992; 17 UST 493.

CHAPTER IVCooperation on Environmental and Urban
Development Problems

Article 14. The Governments of the United States and Spain recognize that among the principal problems with which their peoples are faced are the dangers to which man is exposed by the deterioration of his environment. Both Governments agree on the need to give urgent attention to such problems and they will begin consultations in order to determine how to coordinate their mutual efforts for their solution.

Article 15. Cooperation for the purposes stated in the foregoing Article will be effected through the exchange of information, the development of teaching and research centers, the training of personnel in specialized institutions, the sending of experts, and the supply of material for carrying out projects of common interest.

Article 16. The fields in which cooperation will be developed will be as follows:

- (a) The fight against pollution in all its forms, especially in the atmosphere, in waters and in the soil;
- (b) Ecology and wildlife conservation;
- (c) Urban and regional planning, including urban renewal and improvement, traffic control, reduction of noise, and protection of the landscape.

CHAPTER VAgricultural Cooperation

Article 17. The Governments of the United States and Spain recognize that the agricultural sector is of great mutual interest

and that it may hold opportunities for exchange of knowledge and assistance; therefore the two Governments agree to study expanding their cooperation in this field.

Article 18. For the purpose of developing the cooperation referred to in the preceding Article, both parties will study the harmonization of standards and common agricultural sanitation provisions; the possibility of carrying out transactions in agricultural surpluses under a system of concessional sales for social or charitable purposes; the preparation of joint plans for teacher training, not only in the classic agricultural disciplines (e.g. agronomy, zootechny, genetics, soil science, horticulture, agricultural engineering) but also in the more modern branches (e.g. food technology, marketing of farm products, rural economics and sociology, forest management); the feasibility of exchange of university professors and agricultural researchers of both countries; scholarships for graduates in agricultural sciences; and the exchange of information on scientific and technical progress in agriculture.

Article 19. In the cooperation between the two Governments, special attention will be given to the Spanish programs of rural management, irrigation, reforestation, and the development of the livestock industry.

Article 20. The two Governments will undertake to exchange their technical knowledge and experience acquired in the sectors named in the preceding Article, whenever possible, including information on the economic aspects of the agricultural market, and to that end they will promote the exchange of technicians and experts in the preparation and execution of such programs.

CHAPTER VIEconomic Cooperation

The Governments of the United States and Spain, desiring to maintain and expand their present cooperation, have examined the situation of their economies in the world context and have reaffirmed their determination to advance and develop their economic relations, and to that end they have agreed as follows:

Article 21. The two Governments reaffirm their determination to expand their trade relations, and consequently they will seek to avoid, insofar as possible and to the extent allowed by their respective economic situations and the development of their balances of payments, measures that effect restrictions on the flow of their reciprocal trade, in accordance with the provisions of the General Agreement on Tariffs and Trade. [1]

Article 22. The two Governments consider it desirable to have a normal flow of United States direct investments in Spain, and to that end they will adopt, provided the United States balance of payments so permits, the necessary measures for encouraging the development of such investments. A similar criterion shall be applied, insofar as circumstances permit, to reducing restrictions imposed by the United States for balance of payments reasons on the purchase of foreign securities, including Spanish securities, by United States citizens in the United States.

Article 23. The two Governments recognize that the loans granted by the Export-Import Bank of the United States have been an important stimulus for the purchase of United States capital goods by Spanish enterprises. Consequently, they will continue in the future to facilitate and give maximum attention to the development of these financial relations.

¹ TIAS 1700; 61 Stat., pts. 5 and 6.

Article 24. The Government of Spain reiterates its objectives of achieving by progressive steps its full integration in the European Community. The Government of the United States declares its sympathetic understanding of Spain's objectives of full integration. The two Governments agree to consult with each other and to keep in close contact in seeking to arrive at mutually satisfactory solutions for any problems of principle or procedure as may arise for either of them in this connection.

Article 25. The two Governments will exchange information on the negotiations now in progress for the establishment of a generalized system of preferences in favor of developing countries.

Article 26. The two Governments reaffirm their interest in continuing the consultations of the Joint Spanish-United States Economic Committee created in 1968, maintaining the competence and terms of reference vested in it in the exchange of notes of July 15, 1968, [1] for the examination of financial and other economic matters of mutual interest. The Committee will meet alternatively in Washington and Madrid at mutually convenient times, under the chairmanship of representatives of appropriate level designated by their respective Governments.

CHAPTER VII

Cooperation with respect to Public Information

Article 27. The Governments of the United States and Spain recognize the value and significance that have been attained in present times by the information media, and they reaffirm their interest in strengthening their cooperation in this field.

Article 28. In order that public opinion in their respective countries may develop a better mutual understanding, both Governments will encourage by all means at their disposal

¹ TIAS 6698; 20 UST 843.

the exchange of radio and television programs, will mutually assist their respective information media, and will prepare an effective long-range plan for exchange in all fields of information dissemination.

Article 29. The two Governments reaffirm their desire to continue and to expand the exchange of their respective official publications.

CHAPTER VIII

Cooperation for Defense

The Governments of the United States and Spain are in agreement in considering that the threat to peace is the greatest problem faced by the modern world, and that it requires that both Governments remain vigilant and continue to develop their ability to defend themselves against such a threat. Consequently, both Governments, within the framework of their constitutional processes, and to the extent feasible and appropriate, will make compatible their respective defense policies in areas of mutual interest, and will grant each other reciprocal defense support as follows:

Article 30. Each Government will support the defense system of the other and make such contributions as are deemed necessary and appropriate to achieve the greatest possible effectiveness of those systems to meet possible contingencies, subject to the terms and conditions set forth hereinafter.

Article 31. The Government of the United States agrees to support Spanish defense efforts, as necessary and appropriate, by contributing to the modernization of Spanish defense industries, as well as granting military assistance to Spain, in accordance with applicable agreements.^[1] This support will be

¹ E.g., TIAS 2849; 4 UST 1876.

conditioned by the priorities and limitations created by the international commitments of the United States and the exigencies of the international situation and will be subject to the appropriation of funds by the Congress, whenever the case so requires, and to United States legislation.

Article 32. The Government of Spain, subject to Spanish constitutional provisions and legislation in force, will authorize the Government of the United States to use and maintain for military purposes certain facilities in Spanish military installations agreed upon by the two Governments. Any major construction that may be necessary for the exercise of this use shall be subject to agreement between the two Governments in the Joint Committee created in Article 36 of this Chapter. The United States is further authorized to station and house the civilian and military personnel necessary for such use; to provide for their security, discipline, and welfare; to store and guard provisions, supplies, equipment and materiel; and to maintain the services necessary for such purposes. The exercise of the functions authorized herein shall be subject to such express terms and technical conditions as the two Governments may agree upon.

Article 33.

(a) The Government of Spain assumes the obligation of adopting the security measures necessary for the exercise of the functions authorized in Article 32. The United States may exercise the necessary supervision and protection of its personnel, equipment and materiel.

(b) The above-mentioned use by the Government of the United States of facilities in Spanish military installations will be free of all taxes, charges and encumbrances. The Government of

Spain will retain free of all charges the ownership of all permanent works constructed for the purpose of this Agreement.

(c) The Government of the United States may remove at any time nonpermanent constructions installed at its expense, as well as its personnel, property, equipment and materiel. However, any substantial removal prior to the expiration of this Agreement will be the subject of prior consultation of the two Governments in the Joint Committee. In the event that any such removal would bring about adverse security consequences, the two Governments will consult immediately in order to adopt appropriate measures.

(d) Whenever the Government of the United States relinquishes a facility authorized in this Chapter, either prior to or as a result of the expiration of the five or ten year period specified in Article 38, the Government of the United States shall not be obligated to leave such facility in the same state and condition it was in prior to its utilization by the Government of the United States, or to compensate Spain for not having returned it in such state, but shall leave the land and permanent constructions thereon in serviceable condition for use by Spanish authorities, provided that the Government of the United States shall incur no additional expense thereby.

(e) In normal circumstances any substantial increase in the personnel or military equipment of the United States in Spain, or any substantial increase in the use by the United States of facilities in Spanish military installations regulated by this Agreement, will be the subject of prior consultation in the Joint Committee and agreed upon between the two Governments through diplomatic channels.

Article 34. In the case of external threat or attack against the security of the West, the time and manner of the use by the United States of the facilities referred to in this Chapter to meet such threat or attack will be the subject of urgent consultations between the two Governments, and will be resolved by mutual agreement in light of the situation created. Such urgent consultations shall take place in the Joint Committee, but when the imminence of the danger so requires, the two Governments will establish direct contact in order to resolve the matter jointly. Each Government retains, however, the inherent right of self-defense.

Article 35. Both Governments consider it necessary and appropriate that the cooperation for defense regulated by this Chapter form a part of the security arrangements for the Atlantic and Mediterranean areas, and to that end they will endeavor to work out by common accord the liaison deemed advisable with the security arrangements for those areas.

Article 36. In order to establish the necessary coordination between the two Governments and to ensure greater effectiveness of the reciprocal defense support granted by the two Governments to each other, the Governments of the United States and Spain agree to establish a Joint Committee on defense matters. The Joint Committee will be the organ in which the two Governments normally will consult with each other and resolve matters that may arise in connection with the reciprocal defense support referred to in this Chapter. The Joint Committee will be organized and will function as specified in the Annex to this Agreement.

Article 37. The two Governments will determine by common accord, through an exchange of notes on this date, the facilities

referred to in Article 32 of this Chapter, as well as the United States force levels in Spain and the assistance programs referred to in Article 31 of this Chapter. Thereafter any change in the number or extent of such facilities will be negotiated in the Joint Committee and agreed upon between the two Governments through an exchange of notes.

CHAPTER IX

Final Provisions

Article 38. This Agreement shall enter into force on September 26, 1970, and will remain in force for five years, whereupon it may be extended, if both Governments agree, for another five years.

Article 39. In order to facilitate the withdrawal of the personnel, property, equipment and material of the Government of the United States located in Spain pursuant to Chapter VIII of this Agreement, a period of one year, during which the withdrawal must be completed, is provided. Such withdrawal shall be commenced immediately upon the expiration of the five year initial period, or, if the Agreement is extended, upon the expiration of the five year extension period. During the withdrawal period above mentioned, not to exceed one year, all of the rights, privileges and obligations deriving from Chapter VIII of this Agreement shall remain in force as long as United States troops remain in Spain.

Article 40. The entry into force of this Agreement will in no way affect the validity or terms of any agreement existing between the Governments of the United States and Spain, with the exception of the Defense Agreement between the United States and Spain, dated September 26, 1953, and its supplementary agreements [1] which shall thereupon be superseded.

¹ TIAS 2850, 5437, 6699; 4 UST 1895; 14 UST 1406; 20 UST 847.

Done at Washington in duplicate, in the English and Spanish languages, each of which shall be equally authentic, this sixth day of August, 1970.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

[SEAL]

William P Rogers [1]

FOR THE GOVERNMENT OF SPAIN:

[SEAL]

Gregorio Lopez Bravo [2]

¹ William P Rogers

² Gregorio Lopez Bravo

Annex

1. The Joint Committee established in Article 36 of Chapter VIII of the Agreement of Friendship and Cooperation Between the United States of America and Spain signed on August 6, 1970 will be composed of the United States Ambassador to Spain and the Foreign Minister of Spain as Co-Chairmen, with the Commander-in-Chief, United States European Command and the Chief of the Spanish High General Staff as their military advisers.

2. The Joint Committee will be permanent throughout the term of the aforesaid Agreement and shall be organized so as to function on a continuous basis.

3. The Joint Committee shall have its headquarters in Madrid, but may hold meetings in other places at the request of either of the two Governments, such places to be determined by mutual agreement.

4. A permanent Secretariat of the Joint Committee shall be established, composed of two members representing each of the two Governments, who shall be charged with the daily handling of routine matters and the preparation of those matters which must be submitted to the Joint Committee for consideration.

5. The Joint Committee will establish such subcommittees as may be appropriate for the discharge of its responsibilities.

6. Subordinate to the Joint Committee, as a Subcommittee thereof, there will be a Joint Air Control and Coordination Center, to maintain and operate a system of warning for air space defense, to assist in the regulation of air traffic, and to provide a means for coordination of the actions of the United States and Spanish forces. The details of the organization and

initial tasks of the Joint Air Control and Coordination Center will be determined by the Joint Committee within two months following the entry into force of this Agreement.

7. The Joint Committee will be assisted by the civilian and military personnel necessary for the fulfillment of its purposes.

8. The Joint Committee shall report to the two Governments on its activities on a monthly basis, and in all cases when the importance of the matter so indicates.

9. The Joint Committee shall prepare and present to both Governments an annual plan to facilitate making compatible their respective defense policies in areas of mutual interest pursuant to Chapter VIII of the aforesaid Agreement.

10. The Government of Spain will provide adequate premises for the Joint Committee. The Co-Chairmen shall determine personnel and administrative needs and arrange for the preservation of the Joint Committee's records and archives.

[Exchanges of Notes]

DEPARTMENT OF STATE

WASHINGTON

August 6, 1970

EXCELLENCY:

I have the honor to refer to the Agreement of Friendship and Cooperation Between the United States of America and Spain signed today, August 6, 1970. In accordance with Article 37 of the Agreement, I wish to advise you that the intentions of my Government regarding military assistance for Spain, pursuant to Article 31 of the Agreement, which I understand are acceptable to the Government of Spain, are as follows:

a. The United States Government is prepared to assist the Government of Spain to apply Export-Import Bank credits to the purchase of the following equipment:

- 36 F-4C Phantom fighter bomber aircraft including necessary accessories and ground equipment for 36 aircraft
- 2 KC-130 aircraft
- 3 P-3 aircraft
- 4 SH-3D helicopters
- 4 Huey Cobra helicopters
- 6 C-130 A or B aircraft

Equipment for the territorial command net of Spanish Army

b. The Government of the United States will seek to obtain from Congress the necessary funds for the following purposes:

(1) Coverage of 70% of the cost, which is not expected to exceed a total of \$50 million, of modernizing and semi-automating the existing aircraft control and warning network in Spain.

(2) Training of Spanish personnel to operate and maintain the United States origin military equipment acquired by Spain.

(3) Military equipment for land forces:

- 1 battalion of M48 tanks (54)
- 2 battalions and 2 batteries of 105 MM Howitzer M108 (48)
- 1 battalion of 155 MM Howitzer M109 (18)
- 1 battalion Armored Personnel Carriers
 - 49 M113 Armored Personnel Carriers
 - 4 M106 Mortar Carriers
 - 7 M577 Command Post Carriers
- 16 Huey UH-1H helicopters
- 1 battalion of 175 MM Guns M107 (12)

c. The Government of the United States intends to loan to the Government of Spain the following vessels, subject, where necessary, to obtaining authorizing legislation:

<u>Type</u>	<u>Quantity</u>	<u>Class of Ship</u>
Submarines	2	Guppy 1A and 11A
Destroyers	5	Various: English, Sumner, Lavalette, Lloyd Thomas
Ocean Minesweepers	4	Aggressive
Landing Ships	3 LST	Chelan County
Auxiliaries	1 ammunition ship	Wrangell
	1 oiler	Cimarron

d. The Government of the United States is prepared to make available to Spain machine tools appropriate for use in the manufacture of munitions, subject to specific agreements with the Government of Spain.

e. The Government of the United States is prepared to relinquish to Spain the Rota-Zaragoza pipeline, subject to the provisions of a procedural annex.

f. The Government of the United States relinquishes any and all claims against the Government of Spain for the residual value of the permanent structures constructed under the Defense Agreement between the United States of America and Spain signed September 26, 1953.

I further wish to advise you that it is the understanding of my Government that the United States of America, subject to Spanish Constitutional provisions and legislation in force, is authorized to use and maintain for military purposes with the appropriate military personnel the facilities in or connected with the following Spanish military installations:

- Torrejon Air Base
- Zaragoza Air Base
- Moron Air Base (standby)
- Rota Naval Base
- Cadiz-Zaragoza petroleum pipeline
and pumping facilities
- Petroleum and other storage facilities
- Communications and navigational
network support facilities

I should appreciate your confirmation of the foregoing understandings on behalf of the Government of Spain.

Accept, Excellency, the assurances of my highest consideration.

WILLIAM P. ROGERS

*Secretary of State of the
United States of America*

His Excellency

GREGORIO LOPEZ BRAVO,

*Minister of Foreign Affairs
of Spain.*

Translation

EMBASSY OF SPAIN

AUGUST 6, 1970

EXCELLENCY:

I have the honor to refer to Your Excellency's note dated today, referring to Article 37 of Chapter VIII of the Agreement of Friendship and Cooperation between Spain and the United States, the translation of which reads as follows:

[For the English language text, see ~~137~~ *translating note*]

I have the honor to inform Your Excellency that the Spanish Government concurs in the understandings set forth in the aforesaid note.

Accept, Mr. Secretary of State, the renewed assurances of my highest consideration.

GREGORIO LÓPEZ BRAVO

Gregorio López Bravo
Minister of Foreign Affairs

His Excellency

WILLIAM P. ROGERS,

*Secretary of State of the
United States of America.*

DEPARTMENT OF STATE

WASHINGTON

August 6, 1970

EXCELLENCY:

I have the honor to refer to the Agreement of Friendship and Cooperation Between the United States of America and Spain concluded on this date.

I should like to confirm our understanding that, in the event the Agreement in Implementation of Chapter VIII of the Agreement is not concluded by September 26, 1970, then the two Governments will be guided by the following considerations in implementing Chapter VIII of the Agreement during the period from September 26, 1970, to the date on which such Agreement in Implementation is concluded:

1. Effect will be given to those separate sections, articles and procedural annexes of the proposed Agreement in Implementation which have been initialed as approved by the authorized representa-

tives of the United States and Spain as of September 26, 1970. Effect will be given to those sections, articles and procedural annexes which are initialed thereafter and prior to the conclusion of the full Agreement in Implementation as of the date on which they are initialed.

2. With respect to the matters covered by those separate sections, articles, and annexes not yet initialed as of September 26, 1970, the Government of Spain will continue to safeguard, consistent with prevailing practices and within the spirit and letter of Chapter VIII of the Agreement, the rights, privileges and immunities of the Government of the United States until such time as the new sections, articles and procedural annexes are initialed.

I should like to propose that, if agreeable to your Government, this note, together with your reply, shall constitute an agreement between our two Governments relating to the implementation of the Agreement, with effect from September 26, 1970.

Accept, Excellency, the assurances of my highest consideration.

WILLIAM P. ROGERS

*Secretary of State of the
United States of America*

His Excellency

GREGORIO LOPEZ BRAVO,

*Minister of Foreign Affairs
of Spain.*

Translation

THE MINISTER OF FOREIGN AFFAIRS

AUGUST 6, 1970

EXCELLENCY:

I have the honor to refer to Your Excellency's note dated today, relating to the Agreement in Implementation of Chapter VIII of the Agreement of Friendship and Cooperation between Spain and the United States of America, the translation of which reads as follows:

[For the English language text, see foregoing note]

I have the honor to inform Your Excellency that the Spanish Government agrees to the understandings contained in the note quoted above.

I take this opportunity, Mr. Secretary of State, to renew to you the assurances of my highest consideration.

GREGORIO LÓPEZ BRAVO

Gregorio López Bravo
Minister of Foreign Affairs

His Excellency
WILLIAM P. ROGERS,
*Secretary of State of the
United States of America.*

[Exchanges of Letters]

THE SECRETARY OF STATE
WASHINGTON

AUGUST 6, 1970

DEAR MR. MINISTER:

During the term of the new Agreement of Friendship and Cooperation Between the United States of America and Spain, signed on behalf of our two Governments on this date, the Government of the United States is prepared to contribute to the funding of various non-military projects as are specifically agreed upon pursuant to the spirit and letter of the Agreement, subject, when necessary, to Congressional authorization and to the availability of funds.

It is understood that the Executive Branch of the United States Government assumes an obligation to seek any necessary appropriations from the Congress for funding of such agreed non-military projects above described.

Sincerely yours,

WILLIAM P. ROGERS

William P. Rogers

His Excellency

GREGORIO LÓPEZ BRAVO,
*Minister of Foreign Affairs
of Spain.*

A Su Excelencia
 WILLIAM P. ROGERS,
 Secretario de Estado de los
 Estados Unidos de América.

Translation

THE MINISTER OF FOREIGN AFFAIRS

AUGUST 6, 1970

DEAR MR. SECRETARY OF STATE:

I have the honor to acknowledge receipt of Your Excellency's note dated today, the translation of which reads as follows:

[For the English language text, see foregoing note]

I have the honor to inform Your Excellency that the Spanish Government has taken due note of the foregoing.

I am, Mr. Secretary of State,
 Sincerely yours,

GREGORIO LÓPEZ BRAVO

Gregorio López Bravo
Minister of Foreign Affairs

His Excellency
 WILLIAM P. ROGERS,
*Secretary of State of the
 United States of America.*

THE SECRETARY OF STATE
 WASHINGTON

AUGUST 6, 1970

DEAR MR. MINISTER:

During the Fiscal Year 1971, the United States Government would be prepared to fund up to \$3 million of such non-military projects

as may be agreed upon pursuant to the Agreement of Friendship and Cooperation signed between the United States and Spain on this date.

Additionally, the Commission for Educational Exchange between the United States and Spain (Fulbright Commission) is now devoting its efforts to educational reform. Apart from the above mentioned \$3 million, the Department of State expects to increase its contribution to the Commission this year, thus enhancing its capacity to contribute to the fulfillment of the Spanish educational plan.

Sincerely yours,

WILLIAM P. ROGERS

William P. Rogers

His Excellency

GREGORIO LOPEZ BRAVO,

*Minister of Foreign Affairs
of Spain.*

Translation

THE MINISTER OF FOREIGN AFFAIRS

AUGUST 6, 1970

DEAR MR. SECRETARY OF STATE:

I have the honor to refer to your note dated today, the translation of which reads as follows:

[For the English language text, see foregoing note]

I have the honor to inform Your Excellency that the Spanish Government has taken due note of the foregoing.

I am, Mr. Secretary of State,

Sincerely yours,

GREGORIO LÓPEZ BRAVO

Gregorio López Bravo
Minister of Foreign Affairs

His Excellency

WILLIAM P. ROGERS,
*Secretary of State of the
United States of America.*

DEFENSE**Use of Military Facilities in Spain****Agreement Between the
UNITED STATES OF AMERICA
and SPAIN**

Madrid, September 25, 1970



DEFENSE

Use of Military Facilities in Spain

Agreement Between the
UNITED STATES OF AMERICA
and SPAIN

Implementing Chapter VIII of the
Agreement of Friendship and Cooperation
of August 6, 1970

Signed at Madrid September 25, 1970

with

Procedural Annexes I through XIII and
Exchanges of Notes



SPAIN

Defense: Use of Military Facilities in Spain

Agreement implementing chapter VIII of the agreement of friendship and cooperation of August 6, 1970.

Signed at Madrid September 25, 1970;

Entered into force September 26, 1970.

With procedural annexes I through XIII^[1] and exchanges of notes.

AGREEMENT IN IMPLEMENTATION OF CHAPTER VIII OF THE
AGREEMENT OF FRIENDSHIP AND COOPERATION BETWEEN
THE UNITED STATES OF AMERICA AND SPAIN
SIGNED AUGUST 6, 1970

PREAMBLE

For the purpose of implementing Chapter VIII of the Agreement of Friendship and Cooperation between the United States of America and Spain dated August 6, 1970, [2] (hereinafter referred to as "the Agreement"), it has been agreed as follows:

DEFINITIONS

For the purpose of this Agreement, the terms used herein and in the Procedural Annexes hereto shall have the following meaning:

1. Facilities. This term means lands and constructions within Spanish military installations.

¹ It is anticipated that additional procedural annexes will be negotiated.

² TIAS 6924; 21 UST 1677.

2. United States Personnel in Spain. This term means anyone included in any of the following three categories of personnel:

a. Members of the United States Forces. This term means:

(1) Military Personnel. This term means personnel belonging to the land, sea or air armed forces of the United States who are permanently or temporarily assigned to Spain by military orders for the performance of official duties, in accordance with Chapter VIII of the Agreement and within the force levels established by agreement with the Spanish Government.

(2) Civilian Employees. This term means non-military personnel who are nationals of or ordinarily resident in the United States and who are employed in Spain by the United States Forces, whether paid from appropriated or non-appropriated funds.

(3) Other Civilian Personnel. This term means employees of a non-Spanish and noncommercial organization hereinafter listed, or hereafter agreed upon by the Joint Committee, who are nationals of or ordinarily resident in the United States and who, solely for the purpose of contributing to the welfare, morale or education of the United States Forces, are accompanying those Forces in Spain. These organizations shall include:

- (a) American Red Cross;
- (b) University of Maryland;
- (c) University of Southern California; and
- (d) United Services Organization.

(4) Dependents. This term means members of the families of personnel included in paragraphs (1), (2) and (3) above, who depend upon such persons for

their support and who are in Spain, and, in any case, the spouse and minor children in Spain of such persons.

b. Personnel Engaged in Exercises or Maneuvers. This term means personnel belonging to the land, sea or air armed forces of the United States who are temporarily in Spain for the purpose of engaging in military exercises or maneuvers authorized in advance by the Spanish Government.

c. Members of Visiting Units. This term means the personnel of the land, sea or air armed forces of the United States who temporarily enter Spain aboard vessels or aircraft, belonging to or chartered wholly by such forces, which are in Spanish territory on visits or for the purpose of providing logistic support to or receiving logistic support from the United States Forces.

3. Military Unit. This term means an operational, logistic or administrative command or element thereof of the land, sea or air armed forces of the United States which:

a. In accordance with Chapter VIII of the Agreement, is stationed in Spain either for the purpose of maintaining a facility used by the United States Forces in a Spanish military installation or for operations, training, or other military activities, including on a rotational basis, within the specific levels agreed upon; or,

b. Although not included in the preceding subparagraph, uses such a facility, in accordance with Chapter VIII of the Agreement, for authorized military purposes.

4. Joint Committee. This term means the Joint Committee on defense matters established by Article 36 of the Agreement.

SECTION I

ADMINISTRATIVE AND MILITARY MATTERS

ARTICLE I

1. In conformity with the provisions of Article 32 of the Agreement, the Government of Spain has authorized the Government of the United States to use and maintain, for military purposes, certain facilities in Spanish military installations, as agreed between the two Governments.

2. The United States Forces are authorized to lease premises for housing and offices, and to contract the necessary services therefor. Any other lease or service contract with private persons required for the logistic support of the United States Forces in Spain must be authorized by the Joint Committee. The premises or services covered by these leases or contracts shall not be considered as military installations or facilities for the purpose of this Section.

3. It is agreed that the United States Forces will not introduce and store in Spain any toxic chemical munitions, asphyxiant or toxic chemical agents of warfare, biological means of warfare, and toxin weapons or toxin agents of either biological or chemical origin.

ARTICLE II

1. Major works and constructions, substantial installations of new equipment, and significant changes in the manner or degree of facilities usage by the United States Forces will be reviewed and agreed upon pursuant to the provisions of Articles 32 and 33(e) of the Agreement.

2. The costs of the activities referred to in the preceding paragraph will be to the account of the Government of the United States except when the two Governments agree otherwise.

ARTICLE III

The costs of training, service, materiel, and supplies required for the exercise of the functions authorized in Spanish military installations by Article 32 of

the Agreement shall be shared by the two Governments in proportion to the activities carried on by each party.

ARTICLE IV

Pursuant to the provisions of Article 33(a) of the Agreement, the Spanish Government assumes the obligation of adopting security measures to ensure the exercise of the functions referred to in Article 32 of the Agreement and the Government of the United States will be responsible for the necessary supervision and protection of its personnel, equipment, and materiel. The security measures which each Government shall adopt to carry out the provisions of this Article, and of the appropriate Procedural Annexes, will be determined in each case by the appropriate Spanish or United States military authorities, pursuant to procedures established by the Joint Committee.

ARTICLE V

At each Spanish military installation in which the United States Forces are granted facilities, the appropriate military authorities of Spain and the United States will establish rules governing maintenance, administration, traffic and similar matters of mutual interest. These rules will conform to general coordinating guidelines and review procedures issued by the Joint Committee.

ARTICLE VI

1. When, in accordance with the provisions of Article 33(c) of the Agreement, the Government of the United States plans a substantial removal of its equipment from a Spanish military installation, the Joint Committee, at the proposal of the military authorities of either of the two countries, will consult regarding the removal. Should the Joint Committee determine that such removal would bring about adverse security consequences and is unable to resolve the matter, the two Governments will consult immediately with respect to appropriate measures.

2. If the military authorities of the United States decide, before or at the expiration of the Agreement, to offer for disposal in Spain any equipment, materiel, or supplies which they have in Spanish territory, the Spanish authorities shall be recognized as having a right of first purchase for such items prior to any other offer for disposal in Spain. Any transfer under this paragraph will be handled in accordance with procedures established by the Joint Committee.

3. The Spanish authorities may propose the purchase of any other equipment, materiel, or supplies excess to the needs of the United States, including equipment affected by the termination of the Agreement. If the United States authorities agree to a proposed transfer, it will be handled in accordance with procedures established by the Joint Committee.

4. Under the terms and conditions provided in Article 33(c) and (d) of the Agreement, the United States Forces may remove all their property, equipment and materiel, including nonpermanent constructions, from any facility used and maintained by them; however, if a removal is in connection with the relinquishment of such a facility, the United States Forces shall leave the lands and permanent constructions thereon in serviceable condition for use by Spanish authorities, provided that the Government of the United States shall incur no additional expense thereby. In the course of such removals, the United States Forces will exercise reasonable diligence in preserving the permanent constructions in serviceable condition.

5. Any equipment, materiel or supplies that have not been purchased by the Spanish authorities or other persons in Spain, pursuant to paragraphs 2. and 3. of this Article, will be removed from Spain by the United States before the end of the withdrawal period provided for in Article 39 of the Agreement.

ARTICLE VII

1. For the exercise of the functions authorized in Chapter VIII of the Agreement, all projects, work, or construction shall be carried out by personnel of the

United States Forces whose presence in Spain has been authorized, or by Spanish contractors who meet requirements established by the Spanish Government for the execution of an analogous public work for the Spanish Government, and who are capable of doing the work under the required conditions directly or through a principal contractor of the United States selected by the Government of the United States.

2. When it is not feasible to carry out the work in the manner established in the preceding paragraph the Joint Committee may, as an exception, authorize its performance through competitive bidding outside Spain, in all cases reserving the right to approve the contract award made by the United States authorities if the successful bidder is a national of a third country.

3. In the projects, work, and construction referred to in this Article, Spanish materials, labor, and equipment will be used as widely as possible consistent with the requirements of the United States in each case, as set forth in the specifications for contract performance and according to the conditions for award, which specifications and conditions shall be as contained in the invitations for bids or request for proposals issued by the United States authorities.

ARTICLE VIII

1. Ships, aircraft and vehicles of the land, sea or air armed forces of the United States, as well as other United States ships and aircraft chartered wholly by such forces, in performance of the functions authorized in the Agreement, may enter and leave Spain, at the Spanish military installations referred to in the exchange of notes provided for in Article 37 of the Agreement or at other locations as provided in the Procedural Annexes. In the same manner and in accordance with the mentioned conditions, these ships, aircraft and vehicles may carry out necessary movements between Spanish military installations and between these and other locations.

2. Military units stationed in Spain may move about within Spanish territory, jurisdictional waters, and air space, when such movements are carried out for the purpose of Chapter VIII of the Agreement. Such movements shall be carried out in accordance with appropriate Procedural Annexes to this Agreement, and the general regulations on land, sea and air traffic in force in Spain. Any movement not covered by the provisions of the Annexes shall require the authorization of the Joint Committee. Further, the Joint Committee shall be given advance notice of any significant movement, and may hold consultations to avoid undue interferences with normal Spanish activities.

3. Other ships, aircraft and vehicles may, for the purposes of the Agreement, enter, leave, or stay in the vicinity of Spanish military installations, subject to the provisions and control measures agreed upon for each locality by the Joint Committee, with the Government of Spain reserving for itself the right of veto in connection with third country ships, aircraft or vehicles.

4. The Spanish Government reserves the normal right to establish within its territory, waters, or air space such closed or restricted areas as it deems appropriate. The delimitation of these areas shall be communicated to the United States Forces through the Joint Committee in each case. The Committee shall negotiate the granting of exceptions to this provision when requested by the United States Forces in Spain.

5. Movements of nuclear powered ships in Spanish jurisdictional waters, as well as their entry into and departure from Spanish ports, shall not be considered to be included under the provisions of the preceding paragraphs; these movements will be in accordance with authorization by the Spanish Government, which will be handled through the Joint Committee.

ARTICLE IX

For the exercise of the functions authorized in Chapter VIII of the Agreement, the United States Forces within the level of forces set forth in the exchange of notes

agreed upon by both Governments and other military units whose presence in Spain has been specially authorized by the Joint Committee may use the public services of Spain on the same terms as the Spanish military forces.

ARTICLE X

1. The sanitation services of both countries will cooperate, when necessary, in the study and adoption of measures pertaining to the maintenance of adequate sanitary conditions in the areas neighboring on the Spanish military installations.

2. All military commands in the installations, both Spanish and United States, shall take special care to prevent any kind of contamination of the environment and of nearby waters. When necessary, they shall take appropriate steps, in agreement with their respective sanitation services, for the purification of the environment and waters.

ARTICLE XI

The United States may establish, maintain and operate, within the facilities used and maintained by the United States Forces in Spanish military installations, military post offices for the use of the United States personnel in Spain in the sending of mail between such post offices in Spain and between such post offices and other United States post offices.

ARTICLE XII

1. In coordination with the appropriate Spanish installation commander, the United States Forces may establish, maintain and operate, within the facilities used and maintained in Spanish military installations by the said Forces, military service exchanges, commissaries, mess halls, social centers and recreational service areas for the use of the United States personnel in Spain.

2. The United States military authorities, in agreement with the Spanish military authorities, shall adopt adequate measures to prevent any improper use of these activities.

ARTICLE XIII

1. For the exercise of the functions authorized in Chapter VIII of the Agreement, the authorities of the United States may assign to and maintain in Spanish territory as members of the United States Forces such military and civilian personnel, together with their dependents, as are necessary for the maintenance and support of the agreed facilities, and for the use of the agreed facilities as operational, logistic or training bases for the United States Forces. The United States authorities will submit to the Joint Committee a quarterly statement of the number of the military and civilian personnel of the United States Forces stationed in Spain in accordance with this paragraph.
2. The United States Forces may bring into Spanish territory limited numbers of nationals of third countries with required specialized skills solely for employment by the United States Forces or their contractors. The Spanish authorities will be provided, through the Joint Committee, with a list of the names and nationalities of such civilians, the Spanish authorities reserving the right not to authorize their entry in Spain. Decisions in these cases will be adopted as promptly as possible, in order not to cause unnecessary obstructions and delays in the movements of personnel decided upon by the military authorities of the United States.
3. The ordinary system of passports in force in Spanish law will not be applicable to the military members of the United States personnel in Spain, who are provided with a military identification card and who may initially enter Spanish territory by showing that card and a copy of their military orders. A sample of this military identification card will be furnished to the Spanish authorities through the Joint Committee.
4. The ordinary system of passports in force in Spanish law will apply to civilian members of the United States personnel in Spain, although such persons are excepted from the provisions of Spanish law with regard to the obtaining of visas and the registration of aliens.

5. Rules governing official identification of United States personnel in Spain subsequent to their initial entry shall be established in the Procedural Annexes.

6. If, once in Spanish territory, any members of the United States personnel in Spain should lose his status, the United States authorities shall notify the Spanish authorities through the Joint Committee, and the individual shall automatically lose all privileges established under this Agreement. The military authorities of the United States shall ensure that any personnel separated from the military service in Spain possess a valid passport with proper validation by the Spanish authorities. In the case of a person who entered Spain with a passport and desires to remain in Spain, the United States authorities, whenever possible, will assist the Spanish authorities to ensure that the individual's change of status is reflected on his passport. If, within sixty days of the notification referred to above, a former member of the United States personnel in Spain be required by the Spanish authorities to leave Spain, the authorities of the United States will assure that transportation out of Spain is provided within a reasonable time without cost to the Spanish Government.

SECTION II

CRIMINAL JURISDICTION AND CLAIMS

ARTICLE XIV

United States personnel in Spain are obligated to respect the laws in force in Spain and to abstain from all activity inconsistent with the spirit of the agreements existing between the United States and Spain, in particular, from all political activity in Spain. The United States assumes the obligation of adopting necessary measures to this end.

ARTICLE XV

1. Subject to the provisions of this Section

a. The military authorities of the United States shall have the right to exercise within the territory under Spanish jurisdiction such criminal and disciplinary

jurisdiction as is conferred on them by the law of the United States over United States personnel in Spain for offenses punishable under the military law of the United States.

b. The authorities of Spain shall have the right to exercise jurisdiction over United States personnel in Spain with respect to offenses committed within the territory under Spanish jurisdiction and punishable by the law of Spain.

2.a. The military authorities of the United States shall have the right to exercise exclusive jurisdiction over United States personnel in Spain with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Spain.

b. The authorities of Spain shall have the right to exercise exclusive jurisdiction over United States personnel in Spain with respect to offenses, including offenses relating to the security of Spain, punishable by its law, but not by the law of the United States.

c. For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include:

(1) treason against the State;

(2) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. For the sole purpose of determining whether an act or omission is a punishable offense under the law of Spain or under the military law of the United States, or both, the interpretation of the law of Spain by the Spanish authorities shall be accepted by the Government of the United States, and the interpretation of the military law of the United States by the authorities of the United States shall be accepted by the Spanish authorities. When, by application of the foregoing provision, it is determined that an act or omission is a punishable offense under

both the law of Spain and the military law of the United States, thereby giving rise to concurrent rights to exercise jurisdiction, the following rules shall be applied:

a. The military authorities of the United States shall have the primary right to exercise jurisdiction over United States personnel in Spain subject to the military law of the United States for the following offenses punishable under such law:

(1) offenses solely against the property or security of the United States, or offenses solely against the person or property of a member of the United States personnel in Spain;

(2) offenses arising out of any act or omission done in the performance of official duty.

b. The authorities of Spain shall have the primary right to exercise jurisdiction over United States personnel in Spain in relation to:

(1) offenses, not included within the provisions of subparagraph 3.a.(2) of this Article, solely against the property or security of the Spanish State, or solely against the person or property of Spanish nationals;

(2) any other offense over which the military authorities of the United States do not possess the primary right to exercise jurisdiction under subparagraph 3.a. of this Article.

ARTICLE XVI

1. When a member of the United States personnel in Spain other than a dependent is charged with an offense by the Spanish authorities, the military authorities of the United States, if the circumstances warrant, will issue a certificate verifying the fact that the alleged offense arose out of an act or omission done in the performance of official duty. The certificate will be transmitted to the appropriate Spanish authorities, by whom it will be considered sufficient proof of such fact for the purpose of paragraph 3.a.(2) of Article XV of this Agreement, without prejudice to the

provisions of paragraph 2 of this Article.

2. In those cases where the appropriate authorities of Spain consider that discussion of a certificate of official duty, issued in accordance with paragraph 1 of this Article, is required, it shall be made the subject of review in the Joint Committee, provided a request for review is received by the Joint Committee within ten days from receipt of the certificate by the Spanish authorities. However, if within the ten day period, the Spanish authorities notify the Joint Committee that for special reasons they wish to consider the matter further, such authorities shall have an additional period of ten days within which to present a request to the Joint Committee for review. The Joint Committee will complete its review expeditiously and in any event within thirty days from the receipt of the request for review.

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ARTICLE XVII

1. Recognizing how important it is that the United States military authorities duly fulfill their responsibilities for the maintenance of good order and discipline among the United States personnel in Spain, and considering that the exercising of disciplinary and criminal jurisdiction is an efficient means to this end, the competent Spanish authorities are empowered to waive in favor of the United States military authorities the primary right of Spain to exercise jurisdiction as set forth in paragraph 3.b. of Article XV of this Agreement, subject to the following rules:

a. The United States military authorities may request the competent Spanish authorities for a waiver by Spain of the said right. The request may be presented in writing no later than 15 days after the date of notification to the United States military authorities of the initiation of proceedings against a member of the United States personnel in Spain.

b. When the competent Spanish authorities determine there is a particular interest that requires Spain to exercise its primary right of jurisdiction, they shall so notify the United States military authorities in writing within a period of 30 days from the

date of receipt of the request for waiver, or within such shorter period of time as may be established pursuant to the provisions of paragraph 4 of this Article. If such notification is not given within the indicated period, the request will be considered as accepted and the United States military authorities will be free to exercise their jurisdiction.

2. The following offenses are examples of those cases in which the competent Spanish authorities may determine there is a particular interest that requires Spain to exercise its primary right of jurisdiction:

- a. offenses against the security of the Spanish State in the cases listed in paragraph 2.c. of Article XV of this Agreement;
- b. offenses causing the death of a human being, robbery or rape; and,
- c. attempts to commit or participation in any of the offenses referred to in subparagraphs a. and b. of this paragraph.

3. In those cases when, in application of the provisions of paragraph 1 of this Article, Spain waives its primary right to exercise jurisdiction in favor of the United States military authorities, the following provisions shall be observed:

- a. The Spanish Government may appoint an observer to be present at the sessions of any United States court-martial which hears the case. Whenever possible, such sessions shall take place in Spanish territory.
- b. The waiver by Spain of its right to exercise jurisdiction shall in no case imply any loss of the rights recognized for injured parties in Articles XXVII and XXX of this Agreement.

4. In order to implement the foregoing provisions of this Article and to facilitate prompt decisions with regard to minor offenses committed in Spanish territory by United States personnel in Spain subject to the military law of the United States, appropriate rules may be established through consultations between the appropriate

authorities of the two Governments. Such rules may include the simplification of procedures as deemed appropriate by the two Governments.

5. The military authorities of the United States shall give sympathetic consideration to requests submitted in writing by the Spanish authorities for waivers of the primary right of the United States to exercise jurisdiction pursuant to paragraph 3.a. of Article XV of this Agreement, in cases wherein Spain considers such waivers to be of special interest. The United States military authorities shall notify the Spanish authorities in writing of their decision regarding such requests within 30 days of their receipt. If such notification is not given within that time limit, the request will be considered to have been accepted and the Spanish authorities will be free to exercise their jurisdiction.

ARTICLE XVIII

1. Within the limits of their respective legal powers, the military authorities of the United States and the authorities of Spain shall mutually assist each other in the arrest of members of the United States personnel in Spain who are in Spanish territory.

2. The authorities of Spain shall immediately notify the military authorities of the United States of the arrest of any member of the United States personnel in Spain.

3. The custody of a member of the United States personnel in Spain, who is legally subject to detention by the military authorities of the United States and over whom Spanish jurisdiction is to be exercised, shall be the responsibility of the United States military authorities, at their request, until the conclusion of all judicial proceedings and, when appropriate, until his surrender is requested by the competent Spanish authorities for execution of the sentence. During such period of custody by the United States military authorities, those authorities, within the legal powers given them by the military law of the United States, shall give full consideration to the decisions of the competent Spanish authorities regarding conditions of custody. The United States military authorities shall guarantee his immediate appearance before the competent

Spanish authorities in any proceedings that may require his presence and, in any case, his appearance at the trial.

ARTICLE XIX

Confinement imposed by a Spanish court upon a member of the United States personnel in Spain shall be served in penal institutions agreed upon for that purpose by the Joint Committee. The Spanish authorities fully guarantee to the authorities of the United States the right to visit such persons at any time and to provide them with such material assistance as the authorities of the United States deem appropriate, in accordance with the pertinent Spanish prison regulations.

ARTICLE XX

1. The military authorities of the United States and the authorities of Spain shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the delivery of objects connected with an offense. The delivery of such objects may, however, be made subject to their return within the time specified by the authority delivering them.
2. The military authorities of the United States and the authorities of Spain shall assist each other in obtaining the appearance of witnesses necessary for the proceedings conducted by such authorities within Spain.
3. The military authorities of the United States and the authorities of Spain shall notify each other of the disposition, including the sentence if any, of all cases in which there are concurrent rights to exercise jurisdiction.

ARTICLE XXI

1. The military authorities of the United States may not carry out a death sentence in Spanish territory.
2. A death sentence imposed upon a member of the United States personnel in Spain by the Spanish authorities in a case over which Spain exercises jurisdiction under the

provisions of this Agreement may be carried out only by a method of execution utilized under both Spanish and United States law.

ARTICLE XXII

Where an accused has been tried in accordance with the provisions of this Agreement either by the military authorities of the United States or the authorities of Spain and has been acquitted, or has been convicted and is serving, or has served, his sentence, or his sentence has been remitted or suspended, or he has been pardoned, he may not be tried again for the same offense within the territory of Spain by the authorities of the other State. However, nothing in this Article shall prevent the military authorities of the United States from trying a military member of the United States personnel in Spain for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Spain.

ARTICLE XXIII

The United States and Spain agree that whenever a member of the United States personnel in Spain is prosecuted under the jurisdiction of Spain he shall be entitled to the most favorable application of the following trial safeguards, which are common to both legal systems:

1. To be tried as promptly as possible;
2. To be informed, in advance of trial, of the specific charge or charges made against him;
3. To be confronted with and to cross-examine the witnesses against him;
4. To have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Spain;
5. To have legal representation of his own choice for his defense throughout all investigative and judicial phases of the entire proceedings or, at his election, to have legal representation appointed by the court at no cost to him under the same terms and

conditions applicable to Spanish citizens;

6. If he considers it necessary, to have the services of a competent interpreter;

7. To communicate with a representative of the Government of the United States and to have such a representative present at his trial;

8. Not be held guilty of a criminal offense on account of any act or omission which did not constitute a criminal offense under the law of Spain at the time it was committed;

9. To be present at his trial which shall be public. However, without prejudice to the trial safeguards listed in this Article, persons whose presence is not necessary may be excluded, if the court so decides for reasons of public order or morality.

10. To have the burden of proof placed upon the prosecution;

11. To be protected from the use of a confession or other evidence obtained by illegal or improper means;

12. Not to be compelled to testify against or otherwise incriminate himself;

13. Not to be required to stand trial if he is physically or mentally unfit to stand trial and participate in his defense;

14. Not to be tried or punished more than once for the same offense;

15. To have the right to appeal a conviction or sentence;

16. To have credited to any sentence of confinement his period of pretrial confinement in a confinement facility of the United States or Spain; and

17. In any proceeding before a contraband court, to have the right to counsel and other trial safeguards guaranteed by this Article.

ARTICLE XXIV

For the purpose of Articles XXVI and XXVII of this Agreement, the term "civilian employees of the United States Forces" also includes "local labor personnel", within the meaning of Article XXXIV of this Agreement, when such personnel are acting in the performance of official duty assigned to them by the United States Forces. This term does not include contractors of the United States and the employees of such contractors, nor does it include other civilian personnel of the United States Forces.

ARTICLE XXV

1. Each Government waives all its claims against the other for damages, in Spanish territory, to the properties owned or used by said Government if the damage:

a. Was caused by military personnel or civilian employees of the armed forces of the other Government in the performance of official duties; or

b. Was caused by use of any vehicles, ship or aircraft owned or utilized by the other Government and used by its armed forces, provided that the vehicle, ship or aircraft causing the damage was being used for official purposes.

Each of the two Governments waives all its claims against the other for rescue or salvage, either maritime or aerial, provided that the rescued or salvaged ship, aircraft or cargo was owned by the other Government and used by its armed forces at the time of the incident.

2. Each Government waives all its claims against the other for injury or death suffered by military personnel or civilian employees of its armed forces while the said military personnel or civilian employees were engaged in the performance of official duties.

3. For the purpose of this Article, it is understood that "local labor personnel" within the meaning of Article XXXIV of this Agreement shall be considered as civilian employees of the armed forces of the United States.

ARTICLE XXVI

1. Military members of the United States personnel in Spain and civilian employees of the United States Forces shall not be subject to suit before Spanish courts or authorities for claims arising out of acts or omissions attributable to such persons done in the performance of their official duties. Such claims may be presented to the Spanish Military Administration and processed according to the provisions contained in Article XXVII of this Agreement.

2. If it should be necessary to determine the applicability of paragraph 1 of this Article, the military authorities of the United States may issue an official certificate stating that a certain act or omission of a military member of the United States personnel in Spain or civilian employee of the United States Forces was done in the performance of his official duties. The Spanish authorities will accept such certificate as sufficient proof of the performance of official duty. When in a particular case the Spanish authorities consider that a certificate of official duty requires clarification, it shall be the subject of expeditious review by the Joint Committee.

ARTICLE XXVII

Claims, other than contractual claims, for damages arising out of acts or omissions done in the performance of official duties by military members of the United States personnel in Spain or civilian employees of the United States Forces, or out of any other act, omission or occurrence for which the United States armed forces are legally responsible, and causing injury or damage in Spain to persons or property shall be dealt with by the Spanish authorities in accordance with the following provisions:

1. Claims for damages shall be presented, processed and decided according to the rules of Spanish law applicable to claims arising from the activities of the armed forces of Spain.

2. The appropriate Spanish authorities shall decide on the admissibility of the claim and, when the case warrants, the amount of damages to be awarded, and shall pay

the amount to the claimant or claimants.

3. Payments made by the appropriate Spanish authorities under the provisions of paragraph 2 of this Article, whether decided administratively or determined by court decision, shall be binding and conclusive upon the Governments of Spain and the United States. The military authorities of the United States shall be informed through the Joint Committee of the payment in a detailed report giving background data, legal grounds for the decision, procedures followed, and the decision taken, accompanied by a proposal for the sharing of the sum involved in conformity with the terms of paragraph 4 of this Article.

4. Payments made by the appropriate Spanish authorities under the provisions of paragraph 2 of this Article shall be shared between the parties as follows:

a. Where the United States alone is responsible the amount awarded or adjudged shall be shared in the proportion of 25 percent chargeable to the Government of Spain and 75 percent chargeable to the Government of the United States.

b. Where the United States and Spain are jointly responsible for the damage, the amount awarded or adjudged shall be apportioned between them according to their comparative responsibility, but, in any case, no more than 75 percent of the amount shall be chargeable to the United States. Where the damage was caused by the armed forces of the United States or Spain, or jointly, and, because of insufficient evidence, it is not possible to attribute the damage specifically to one of the forces or to apportion the damage between the forces according to their comparative responsibility, the amount awarded or adjudged shall be shared equally between Spain and the United States.

c. The proposed distribution referred to in paragraph 2 of this Article shall be regarded as having been accepted by the military authorities of the United States, unless those authorities, within 60 days after receipt of the proposal, request consultations in the Joint Committee, which consultations shall be undertaken

expeditiously. If, within 60 days after the request by the military authorities of the United States, such consultations do not result in agreement regarding an appropriate distribution, the matter shall be referred to an arbitrator selected by agreement between the two Governments from among the nationals of Spain who hold or have held high judicial office. The arbitrator shall decide a formula of distribution in accord with the principles of subparagraphs a. and b. above, and his decision shall be binding and conclusive on the two Governments. The compensation of the arbitrator shall be fixed by agreement between the two Governments and shall, together with the necessary expenses incidental to the performance of his duties, be shared equally by them.

5. Every three months a statement of the sums paid by the Spanish authorities in the course of the three-month period in respect of every case regarding which the proposed distribution has been accepted by the military authorities of the United States shall be sent to the appropriate United States authorities together with a request for reimbursement. Such reimbursement shall be made in Spanish currency within the shortest possible time, but not more than 60 days from the receipt of such request for reimbursement.

ARTICLE XXVIII

Claims for injury or damage to persons or property in Spain caused by reason of exercises or maneuvers carried out by the United States Forces with the express authorization of the Spanish Government shall be governed by the agreement reached in each case by the authorities of the two Governments.

ARTICLE XXIX

The Government of the United States shall require that insurance contracts be effected to cover civil liabilities that may be incurred in Spanish territory as a result of acts or omissions done in the performance of duty by employees of contractors and sub-contractors of the United States Forces, or by those members of the United States personnel in Spain, other than dependents, to whom the provisions of Articles XXVI and

XXVII of this Agreement are not applicable. The terms and conditions of such insurance contracts shall be determined in an appropriate procedural annex.

ARTICLE XXX

1. Damage or injury caused in Spanish territory to persons or property by acts or omissions of military members of the United States personnel in Spain or civilian employees of the United States Forces not done in the performance of official duties may, at the election of the claimant, be dealt with by:

a. The prosecution of a suit before a Spanish civil court; or

b. A claim against the Government of the United States, processed through the following procedures:

(1) The claim, addressed to the United States Foreign Claims Commission, will be submitted to the Secretariat of the Joint Committee;

(2) After having obtained precise information, the Secretariat will issue a detailed report on the claim submitted and the damages sought;

(3) Within 60 days of receipt by the Secretariat, the claim, with the report of the Secretariat, will be transmitted to the Foreign Claims Commission for decision;

(4) The decision of the Foreign Claims Commission will be final.

2. The filing of a suit before a Spanish civil court against a military member of the United States personnel in Spain or civilian employee of the United States Forces will be considered to be the renunciation of any right of the Spanish Government or of the person filing the suit to compensation by the Government of the United States in accordance with this Article. However, when such a suit is terminated because of the issuance by the military authorities of the United States of the certificate of official duty referred to in paragraph 2 of Article XXVI of this Agreement, a claim may be processed according to the provisions of Article XXVII of this Agreement.

ARTICLE XXXI

The compulsory insurance of official motor vehicles of the United States Government and of privately owned vehicles belonging to United States personnel in Spain shall continue to be regulated by the Agreement of November 30, 1965, as supplemented by the rules agreed on for its implementation dated March 25, 1966, or by any other agreement that may replace it. The aforesaid Agreement and rules, or those that may replace them, shall have prior application with respect to the filing and settlement of claims arising from the operation of the said vehicles in accordance with the provisions of Articles XXVII and XXX of this Agreement.

ARTICLE XXXII

The military authorities of the United States shall render all assistance permitted by United States law to secure compliance with judgments, decisions, orders and settlements in connection with civil liabilities established by Spanish courts and authorities.

ARTICLE XXXIII

The provisions of this Section shall not apply to any offenses committed, any acts or omissions occurring, or any claims arising before the entry into force of this Agreement. Such offenses, acts, omissions, or claims shall be governed by the appropriate provisions of the Technical Agreement Annex to the Defense Agreement of September 26, 1953, and its implementing agreements and regulations.

SECTION III

LABOR MATTERS

ARTICLE XXXIV

The term "local labor personnel" used in this Section means persons, other than United States personnel in Spain, engaged in labor activity to meet the needs of the United States Forces in Spanish military installations, including the activities referred to in Article XII of this Agreement.

ARTICLE XXXV

1. The employment relationship to which this Section refers shall be between the local

labor personnel and the Spanish Military Administration who hire them, although the assignment of such personnel to their jobs and their direction shall be the responsibility of the United States Forces.

2. On the date of contract replacement provided for in paragraph 2 of Article XLII of this Agreement, the employment relationship of local labor personnel shall be adapted to the terms of this Section.

3. The labor regulations applicable to non-Civil Service civilian personnel of the Spanish Military Administration, hereinafter referred to as "the Spanish Regulations," will govern the terms and conditions of employment of local labor personnel, except with reference to the modifications or alterations established in specific provisions of this Section.

4. Each military installation utilizing local labor personnel will have a Personnel List reflecting the needs and data referred to in paragraph 1 of Article XXXVII of this Agreement. The List will include administrative personnel whose services are used by the United States Forces to carry out the responsibilities of the said Forces under this Section. To facilitate the preparation of the said Lists, the United States Forces will, no later than 60 days after the entry into force of this Agreement, provide to the Spanish Military Administration a listing by categories of the number of positions utilized at each installation on the said date of entry into force.

ARTICLE XXXVI

The Spanish Military Administration will be responsible for the employment of local labor personnel, as provided in this Section, and as the employer will exercise the following rights and responsibilities:

1. Develop jointly with the United States Forces, through the Joint Committee, the terms, conditions, and rules relating to the utilization of local labor personnel by the United States Forces.

2. Issue calls for and refer to the United States Forces persons considered qualified for appointment, as requested by the United States Forces. To assist the United States Forces in selection of personnel, a sufficient number of qualified applicants to meet the needs of the United States Forces will be referred for each vacant position.
3. Effect appointments for utilization by the United States Forces, terminations of such utilization, and other appropriate personnel actions as requested by the United States Forces, in accordance with the Spanish Regulations.
4. Effect disciplinary actions as initiated by the United States Forces, in accordance with the Spanish Regulations.
5. Pay local labor personnel, in accordance with payrolls prepared by the United States Forces in advance of the regulation paydays, their salaries, wages, and any other emoluments to which they may be entitled. The Spanish Military Administration will inform the United States Forces of all deductions required by Spanish law which will be reflected in the said payrolls.

ARTICLE XXXVII

In order to guarantee greater efficiency in the labor relationship, and as the user of the services of local labor personnel, the United States Forces will exercise the following rights and responsibilities:

1. Determine, in accordance with their needs, the number, types, levels of compensation including bonuses and fringe benefits, and qualification requirements of positions to be filled by local labor personnel, and transmit such determinations to the Spanish Military Administration. The level of compensation for a position shall not be less than as established for such position by the Spanish Regulations.
2. Determine the selection for appointment as local labor personnel, on a temporary or indefinite basis, from among persons referred by the Spanish Military Administration. On an exceptional basis, the United States Forces may directly recruit and select persons for

appointment to positions having a technical nature or specialized requirements, and, in coordination with the Spanish Military Administration, to positions in labor shortage categories. Persons directly recruited by the United States Forces must satisfy the conditions required of non-Civil Service civilian personnel of the Spanish Military Administration. Any person whose prior utilization by the United States Forces was involuntarily terminated other than for cause will be given priority consideration in the selection process.

3. Notify the Spanish Military Administration of the selection of personnel, and request appointment and detail of persons so selected to the United States Forces.
4. Determine, in accordance with the Spanish Regulations, reassignments, promotions and terminations of utilization and notify the Spanish Military Administration thereof.
5. Exercise disciplinary authority for minor faults as defined in the Spanish Regulations, and report the steps taken to the Spanish Military Administration.
6. Initiate disciplinary actions for other than minor faults, conduct preliminary proceedings to verify the facts, forward a record of such proceedings to the Spanish Military Administration, participate in the formal proceedings and propose an appropriate resolution to the Spanish authorities.
7. Organize the work of local labor personnel in order to take care of the needs of their own service most efficiently, specifying working schedules and vacation periods. In no case may vacation periods be less than the minimums required by the Spanish Regulations.
8. Adopt pertinent measures for the training and development of local labor personnel.
9. Prepare local labor personnel payrolls and submit them in due time to the Spanish Military Administration.
10. Reimburse the Spanish Military Administration for all payments made as provided for

in Article XXXVI of this Agreement and for such related administrative costs as may be agreed upon by the Joint Committee.

ARTICLE XXXVIII

1. When the service needs of the United States Forces in Spain require a reduction in force of local labor personnel, the military authorities of the United States shall, in advance, so inform the Spanish Military Administration, who shall take action to effect terminations of utilization as requested by the United States Forces.

2. Local labor personnel whose utilization is terminated by a reduction in force shall be entitled to severance pay for permanent termination of services as provided in the Spanish Regulations, which amount shall be paid by the Spanish Military Administration who shall be reimbursed by the United States military authorities. The same procedures shall apply in the case of termination of utilization of local labor personnel because of the expiration of the Agreement.

3. For the purpose of determining the severance pay referred to in paragraph 2 of this Article, only continuous employment by the United States Forces prior to the date of contract replacement provided for in paragraph 2 of Article XLII of this Agreement, for which no previous severance pay has been granted, and service rendered as local labor personnel utilized by the United States Forces subsequent to entry into force of this Agreement shall be credited. This provision shall not include service rendered prior to the entry into force of this Agreement by workers who, although having been employed by the United States Forces during the period of such service, were not so employed at the said entry into force.

ARTICLE XXXIX

1. The provisions of this Section shall not apply to:

a. Functions or activities of the Embassy of the United States, the United States Information Agency, the Office of the Defense Attache of the United States, the Military Assistance Advisory Group (MAAG), the Joint United States Military Group (JUSMG), or the

Liaison Offices of the United States Forces in Spain.

b. Employees of contractors or concessionaires performing work in Spain for the United States Forces.

c. Employees hired privately by members of the United States personnel in Spain.

2. Employees referred to in subparagraph 1.b. above, except those who are nationals of or ordinarily resident in the United States, and the employees referred to in subparagraph 1.c. above shall be fully subject to Spanish labor legislation.

3. The Government of the United States and its armed forces and their organizations, units, agencies or instrumentalities and members shall not be subject to Spanish court actions instituted by local labor personnel, or by any person previously employed by the United States Forces, based on claims arising from their employment or from their utilization pursuant to the provisions of this Section.

ARTICLE XL

In regard to the labor relationship covered by this Section, the Joint Committee shall exercise the following authority:

1. Propose to the Spanish Government such rules as it deems pertinent for adapting the Spanish Regulations, and their supplementary rules, to the special conditions of employment of local labor personnel; these rules shall be sufficiently precise to guarantee United States participation in labor cases for the imposition of disciplinary sanctions on local labor personnel.

2. To consult and report to the Spanish military authorities prior to the rendering of Spanish administrative decisions pertaining to monetary and administrative claims involving local labor personnel and arising from their utilization by the United States Forces.

3. To consult and agree on the consequences of final decisions by the Spanish authorities regarding claims referred to in paragraph 2 of this Article. Such consequences may include

sharing by Spain and the United States of the payment of monetary awards, and appropriate resolution of questions relating to the further utilization by the United States Forces of local labor personnel affected by such decisions.

ARTICLE XLI

The Government of Spain shall adopt the necessary administrative measures to implement the provisions of this Section. Such measures shall enter into force on the date of contract replacement provided for in paragraph 2 of Article XLII of this Agreement.

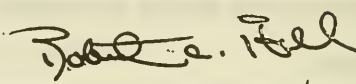
ARTICLE XLII

1. The labor relationship of Spanish personnel presently employed by the United States Forces in accordance with the provisions of the Defense Agreement of September 26, 1953, and its supplementary provisions on labor matters, shall terminate after entry into force of this Agreement as provided in this Article.
2. On a date to be agreed upon by the Joint Committee, but in no event later than six months from the date of entry into force of this Agreement, the employment contracts of local personnel presently employed by the United States Forces shall be replaced by new ones adapted to the Spanish Regulations and to the specific rules contained in this Section. All compensation to which the workers concerned are individually entitled at that time shall be respected.
3. Prior to the date of contract replacement provided for in paragraph 2 of this Article, local personnel presently employed by the United States Forces shall be entitled, in the event their employment is terminated other than for cause, to severance pay as provided in the Spanish Regulations.
4. Between the date this Agreement enters into force and the date of contract replacement provided for in paragraph 2 of this Article, all additional employees whose services are required will be employed by the United States Forces under temporary appointments, not to exceed the said date of contract replacement, under conditions of employment in effect prior to the date the Agreement enters into force. Such employees, if

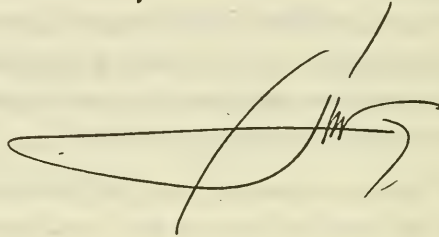
subsequently converted to local labor personnel under the provisions of this Agreement, will be converted in accordance with the terms of the Spanish Regulations.

Done at Madrid in duplicate, in the English and Spanish languages, each of which shall be equally authentic, this twenty-fifth day of September, 1970.

For the Government of the United States of America:

 [1]

For the Government of Spain:

 [2]

[SEAL]

[SEAL]

¹ Robert C. Hill

² Gregorio Lopez Bravo

AGREEMENT IN IMPLEMENTATION OF CHAPTER VIII OF THE
AGREEMENT OF FRIENDSHIP AND COOPERATION BETWEEN
THE UNITED STATES OF AMERICA AND SPAIN
SIGNED AUGUST 6, 1970

PROCEDURAL ANNEX I

COMMAND, SECURITY AND ADMINISTRATION OF SPANISH MILITARY

INSTALLATIONS AGREED IN EXCHANGE OF NOTES

1. Command

1.1. Only the Spanish flag will be flown.

1.2. The installations will be under Spanish command. United States commanders, however, shall exercise authority and control over United States personnel, equipment and materiel.

1.3. Commanders of the United States Forces will keep the Spanish installation commander informed of routine day-to-day contacts with local off-base Spanish officials. In other cases requiring contacts with local off-base Spanish authorities, however, commanders of United States Forces will make such contacts in conjunction with the Spanish installation commander.

1.4. Military honors will be rendered by Spanish Forces; however, they may be rendered jointly when agreed by the Spanish installation commander and the commander of United States Forces under procedures established by the Joint Committee. Plans for significant military honors will be reported in advance to the Joint Committee for its approval.

2. Security

2.1. The security of Spanish military installations shall be the responsibility of the Spanish Forces. The United States Forces, however, are responsible for the supervision and protection of their personnel, equipment, and materiel, and, accordingly, may take measures in fulfillment of these responsibilities in facilities used by them, but must inform the Spanish commander of any protective measures adopted, for purposes of coordination. By mutual agreement the United States Forces may also assist in the maintenance of security in other areas of the installation used by both Forces.

2.2. The United States Forces are authorized to station air, naval, or marine guards with the Spanish Guard at entrances and exits of the installations.

2.3. Whenever the United States Forces request reinforcement of external security measures, the United States commander will, if requested by the Spanish commander, permit the use by the Spanish Forces of such available vehicles and equipment, and for such period of time, as the two commanders agree are required.

3. Administration

3.1. In accordance with Article V of Section I of the Agreement in Implementation, the Spanish commander and the commander of United States Forces will develop mutually acceptable procedures for the installation, taking into account the specific needs of both forces. A copy of these procedures will be furnished the Joint Committee for coordination and review.

3.2. The Spanish commander of the installation will establish appropriate procedures regulating entry and exit of the installation. These procedures shall guarantee the entry into and exit from the installation by United States personnel in Spain. These procedures will also include provision for the entry and exit of visitors and guests without hindrance or delay, except when security reasons require otherwise. The Joint Committee will develop procedures for the admission and visit to the installations by dignitaries who have no authority over forces stationed in Spain.

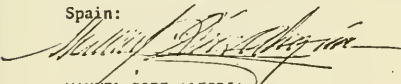
3.3. The cost of maintenance and upkeep of facilities used exclusively by United States Forces will be borne by the United States Forces.

3.4. Maintenance and upkeep costs of facilities used both by United States and Spanish Forces will be shared by the two forces as agreed between the appropriate United States and Spanish authorities in accordance with Article III of Section I of the Agreement in Implementation. In the event agreement cannot be reached, the matter will be referred to the Joint Committee.

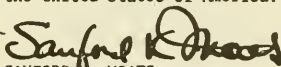
3.5. All signs, posters and notices of general interest in streets, buildings, and installations will be written in Spanish and, when considered appropriate by the Spanish and United States commanders, they may be repeated in English, with the same validity and significance.

MADRID, The 25th of September 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD R. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX II
MILITARY PERSONNEL AND DISCIPLINE
IN THE U.S. ARMED FORCES

1. The military authorities of the United States Forces are responsible for the maintenance of discipline over military members of the United States Personnel in Spain.

2. In furtherance of the maintenance of discipline, United States military authorities may, in coordination with the Spanish base commander, establish military police or shore patrol units on the Spanish military installations where United States Forces are located, under regulations which will be furnished to the Joint Committee for coordination and review. United States military authorities may also authorize the use of such units in communities near Spanish military installations, in cooperation with local police officials, under regulations agreed to by the Spanish and United States military authorities. These regulations will also be furnished to the Joint Committee for coordination and review.

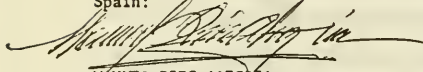
3. Military members of the United States Personnel in Spain are authorized:

3.1. to wear the uniform of their service while on duty,

3.2. to carry arms on official duty when authorized by the United States military authorities, in agreement with the Spanish base commander.

MADRID, The 25th of September 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD K. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX III
PASSPORTS AND IDENTIFICATION DOCUMENTS FOR
UNITED STATES PERSONNEL IN SPAIN

1. In furtherance of the provisions of Article XIII, Section I of the Agreement in Implementation, military members of the United States personnel in Spain may enter and depart Spanish territory upon the presentation of their military identification card and their orders. The orders will include a stamped or other certification, in the Spanish language, that the individual is authorized by the appropriate military authorities of the United States to proceed to Spain in a duty status. A sample of the military identification card will be furnished to the appropriate Spanish authorities through the Joint Committee.

2. Civilian members of the United States personnel in Spain shall be required to have a passport for entering and departing Spain. Such persons are excepted from the provisions of Spanish law with regard to the obtaining of visas and the registration of aliens.

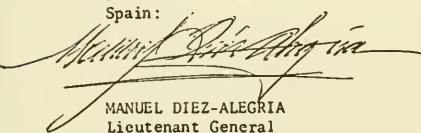
3. In order that members of the United States Forces permanently assigned to Spain may prove their status as such at all times, they will be provided, by the Director General of Security with a special identification card printed in Spanish.

4. If, once in Spanish territory, any member of the United States personnel in Spain should lose his status, the United States authorities shall notify the Spanish authorities through the Joint Committee, and the individual shall automatically lose all privileges established under the Agreement in Implementation. The military authorities of the United States shall ensure that any personnel separated from the United States-military service in Spain possess a valid passport with proper validation by the Spanish authorities. In case a person who entered Spain with a passport desires to remain in Spain, the United States authorities, whenever possible, will assist the Spanish authorities to ensure that the individual's change of status is reflected on his passport. If, within sixty days of the notification referred to above, a former member of the United States personnel in Spain be required by the Spanish authorities to leave Spain, the authorities of the United States will assure that transportation out of Spain is provided within a reasonable time without cost to the Spanish Government.

5. In the case of a member of the United States Forces permanently assigned to Spain who loses his status as such, the identification card referred to in paragraph 3 above shall be withdrawn by the United States military authorities and returned to the Director General of Security through the Joint Committee.

MADRID, The 25th of September 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD K. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX IVDRIVER'S LICENSES

1. Members of the United States Forces in Spain holding valid drivers' licenses issued by a competent agency of the United States shall receive Spanish drivers' licenses. These licenses shall be issued by the Jefatura Central de Trafico of the Ministry of the Interior in Madrid, without test or fees.
2. A member will complete an application form giving his personal identification data, to which he will attach two carnet-size photographs, his United States driver's license, and such other information as the Joint Committee may determine is required. This form will be sent to the Jefatura de Trafico of Madrid, which will issue, without fees, within a two-week period, a Spanish driver's license of a type corresponding to the United States license held by the applicant. At the same time, the applicant's United States license will be returned to him.
3. While the application for a Spanish driver's license is being processed, the applicant shall be entitled to operate a motor vehicle on the basis of a duly certified Spanish translation of his United States license.
4. Spanish driver's licenses issued in accordance with this Annex will remain valid for the period of time provided by Spanish law, and will

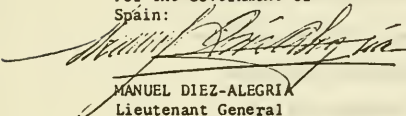
be renewed without test or fee, as necessary to assure validity, for the duration of the bearer's assignment as a member of the United States Forces in Spain. Upon the termination of the bearer's assignment in Spain, the license shall be returned to the Jefatura Central de Trafico of the Ministry of the Interior in Madrid through the Joint Committee.

5. Operators of United States Government vehicles must possess valid United States military drivers' licenses. No Spanish driver's license will be required for the operation of such vehicles by United States personnel in Spain.

6. Members of the Spanish Armed Forces who go to the United States in connection with their duty and who possess a valid driver's license issued by the competent Spanish authorities shall be provided with a document by the United States military authorities in Spain certifying the validity of such Spanish driver's license in accordance with the Convention on Road Traffic of September 19, 1949.

MADRID, The 25th of September 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD K. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX VREGISTRATION OF MOTOR VEHICLESOF MEMBERS OF THE UNITED STATES FORCES

1. The privately owned motor vehicles of members of the United States Forces permanently assigned to Spain shall be registered in accordance with the following provisions of this Annex.
2. Applications for the clearance through customs of these vehicles shall be made pursuant to the provisions of the appropriate Procedural Annex. Upon the receipt of an application for clearance, the customs authorities of the port of entry shall prepare a permit, which shall be issued immediately upon the arrival of the vehicle. This permit will be issued free of duties, fees, or charges, and shall be valid as long as the vehicle is registered to a member of the United States Forces.
3. Applications for registrations shall be submitted by the Joint United States Military Group in Spain (JUSMG) directly to the Jefatura de Trafico in Madrid. The Jefatura de Trafico shall approve the applications for registration and shall validate the registration number and issue the registration permit which shall constitute the authorization for the operation of the vehicle concerned in Spain. This registration shall be free of duties, fees, or charges. Registrations thus made shall be valid for the duration of the official assignment of the applicants as members of the United States Forces in Spain.

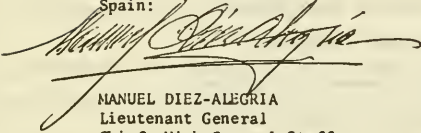
4. Vehicles of members of the United States Forces in Spain shall be exempt from inspection by the Delegacion de Industria.

5. The Joint United States Military Group in Spain (JUSMG) shall be responsible for the administrative control of the registration numbers issued. If the owner of a vehicle registered in accordance with paragraph 3 of this Annex loses his status as a member of the United States Forces, the Joint United States Military Group in Spain (JUSMG) shall so notify the Director General of Customs and the Jefatura de Trafico in Madrid.

MADRID, The 25th of September 1970

For the Government of
Spain:

For the Government of
the United States of America:


 MANUEL DIEZ-ALEGRIA
 Lieutenant General
 Chief, High General Staff


 SANFORD K. MOATS
 Major General, USAF
 Chief, JUSMG-MAAG

PROCEDURAL ANNEX VI
RULES GOVERNING MEDICAL SERVICES OF THE
UNITED STATES FORCES IN SPAIN

1. The procedures in this Annex shall apply to the health care and medical services of the United States Forces in Spain.
2. For the purposes of this Annex, the term "medical personnel" means the physicians, surgeons, specialists, dentists, nurses and other members of the United States personnel in Spain who perform medical services, and other doctors of United States nationality or ordinarily resident in the United States employed or contracted in exceptional cases by the United States Forces.
3. The military authorities of the United States are authorized to maintain those hospitals and other health facilities in Spanish territory existing on the effective date of the Agreement in Implementation, or those which may be authorized in the future through the Joint Committee.
4. Medical personnel may perform medical services in Spain of the same type which such persons are authorized to perform at United States military medical facilities, subject to the limitations contained in this Annex, without prior examination or revalidation of their professional certificates by the Spanish authorities; provided that

medical treatment punishable by the law of Spain may not be performed by the medical personnel.

5. The Joint Committee shall determine categories of persons eligible for medical care from United States military medical facilities in Spain. Pending such determination, medical personnel shall limit their services to persons presently eligible. In case of emergency, such personnel may render medical assistance to any persons in Spanish territory.

6. Normally, medical personnel will practice their profession in the hospitals and other medical centers of the United States Forces in Spain; but may render their assistance to authorized persons in any place or facility in which they may be found. If such persons are in a Spanish medical center, said assistance shall be carried out under the authority of the director of the establishment.

7. No member of the medical personnel shall practice medicine in Spanish territory, except as provided in this Annex or when such practice is expressly authorized by Spanish authorities.

8. Births occurring in medical centers of the United States Forces in Spain or elsewhere in Spanish territory which are attended by doctors belonging to the medical personnel referred to in this Annex shall be certified and registered according to Spanish law. The certificates and other documents issued by said United States doctors shall have the same legal effect, to this end, as those issued in similar cases by Spanish doctors.

9. Patients suffering from contagious or infectious diseases shall be treated, isolated or transported out of Spanish territory, in accordance with the requirements and regulations of Spain and the

United States for the movement and isolation of such cases so as to avoid any spread of contagious diseases.

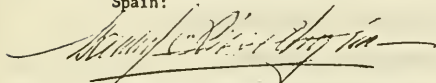
10. The remains of United States personnel who die in Spanish territory may be claimed, given post mortem examination, embalmed and transported outside such territory upon authorization of the appropriate Spanish authorities. When death occurs outside of a medical center of the United States, the remains of such persons will be delivered as soon as possible to the custody of United States military authorities. The certificates of death and other required documents will be prepared, in accordance with Spanish law, by the Spanish or U.S. doctor who certifies death. The Spanish authorities will have access to any document or proceeding which is originated to comply with legal provisions established by Spanish law. Delivery of the remains and post mortem examination will, in all cases, be subject to the appropriate judicial authority if the cadaver is at the disposal of a judge in order to carry out a judicial proceeding. Spanish doctors who attest to the death of United States personnel will prepare documents required by the Government of the United States to confirm said death.

11. When serious circumstances make it advisable, and at the request of the Spanish Government, the health centers and services of the United States Forces may be utilized as much as practicable to meet Spanish needs. Under the same circumstances, Spanish centers and health services will lend all possible assistance to take care of a like request from the United States authorities. In case of a natural

disaster which might affect a large number of people, assistance will be given on a reciprocal basis; further, Spanish and U. S. facilities and health services will cooperate to the greatest extent practicable and they will be used jointly in the common good.

MADRID, The 25th of September 1970

For the Government of
Spain:


MANUEL DíEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD K. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX VIIRULES FOR THE USE OF SPANISH AIR BASES BY UNITED STATESFORCES AND REGULATION OF AIR MOVEMENTS OF SUCH FORCES1. General

1.1. This Annex applies to all aircraft of the land, sea or air armed forces of the United States, as well as United States civilian aircraft chartered wholly by such forces, which are in Spanish air space or are using Spanish air bases or airports in performance of the functions authorized in the Agreement of Friendship and Cooperation. Hereafter, these aircraft shall be generally referred to as "aircraft of the United States Forces."

1.2. Air movement is understood to mean overflight, landing or take-off in Spain or Spanish sovereign territory by aircraft of the United States Forces.

1.3. Air movements of aircraft of the United States Forces in Spanish air space in performance of the functions authorized in the Agreement of Friendship and Cooperation will be conducted in accordance with Article VIII of Section I of the Agreement in Implementation and the following provisions of this Annex.

1.4. No third country aircraft shall use a Spanish air base or airport as a result of the Agreement, except in accordance with provisions

and control measures agreed upon by the Joint Committee and subject to veto in each case by the Government of Spain.

2. Usable air bases and airports

2.1. Aircraft of the United States Forces may use the air bases (including the Naval Air Facility at Rota) enumerated in the Exchange of Notes regarding United States use of Facilities in Spanish Military Installations, dated 6 August 1970. ^[1]

2.2. If aircraft of the United States Forces should need to use an air base not included in the Exchange of Notes referred to in the preceding paragraph, necessary logistical and technical assistance will be furnished depending on the services available in such air bases.

2.3. If, for a special reason, aircraft of the United States Forces should need to use a civil airport, the authorities of the United States shall submit to the Spanish air authorities a request to that effect, giving reason, at least 48 hours in advance.

2.4. In case of aircraft emergency, United States Forces are authorized to use any air base or airport.

2.5. The use of the Spanish air bases and airports by aircraft of the United States Forces, as stated in the preceding paragraphs, shall be free of all charges, taxes, or encumbrances. Payment will be made for material assistance.

3. Air Traffic

3.1. All flights will be conducted in accordance with duly approved flight plans. Such flights shall be governed by the general Rules of Flight in force in Spain, approved and published by appropriate Spanish authorities, and by the instructions given by Spanish regional or local air traffic control authorities.

¹ TIAS 6924; 21 UST 1714.

3.2. The air traffic control authorities are:

3.21. Regional:

Chief of Regional Flight Information Centers (FIC).

Chief of Area Control Centers (ACC).

3.22. Local:

Flight Officer, designated by the Commander of the
Air Base.

Airport Traffic Official.

Chief Controller, designated by both.

3.3. Military control towers will be under the direction of a Spanish Flight Officer. To the extent that coordination of control of flights of aircraft of the United States Forces is necessary, one or more US controllers, who have ample knowledge of Spanish, will be used to assist the Spanish Chief Controller.

3.4. The United States authorities will notify the competent Spanish authorities at least twelve (12) hours in advance of squadron or larger group formation flights entering, departing or overflying Spanish territory. With the same advance notice, they will report any air movements which may create a substantial increase in the usual air activity, and those which because of their type may pose a special risk to the civilian population. If such an air movement poses problems which cannot be resolved within the Ministry of Air along the lines established by the Joint Committee, the movement will be immediately reported to the Joint Committee for appropriate action.

3.5. Flights in and out of the airbases and airports referred to in paragraph 2 above will be subject to current flight regulations (including traffic precedence, time and area restrictions) duly established by appropriate Spanish authorities for the safe and orderly flow of air traffic in Spain.

4. Air Space for training

4.1. The Spanish Ministry of Air will make available through the Joint Committee to the United States Forces, within the level of forces agreed upon by the Exchange of Notes, and to those other military units whose presence in Spain has been authorized by the Joint Committee, such airspace within that established for the training of the Spanish Air Forces, as is required for the training of the United States Forces, including air-to-air and air-to-ground training.

4.2. Air space for training shall be carefully demarcated with respect to area as well as the flight levels and schedule to be used. The use of this air space will be subject to the safety and flow of both civil and military air traffic.

4.3. Training flights at levels below two thousand (2,000) feet (610 meters) will not be conducted by jet aircraft of the United States Forces, except in air spaces or along routes that the Spanish Ministry of Air may make available for such use through the Joint Committee.

5. Bombing and gunnery ranges

5.1. The United States Forces, within the level of forces agreed upon by the Exchange of Notes, and those other military units whose presence in Spain has been authorized by the Joint Committee, are authorized to use, for their bombing and gunnery training (air-to-air and air-to-ground) those firing ranges listed in the Exchange of Notes, and such others as are required for the training of the United States Forces and approved by the Joint Committee.

5.2. The Spanish and United States Forces shall coordinate the dates and schedules for the use of these facilities in order to prevent interference and obtain optimum utilization, and they shall establish

the necessary procedures governing the use of subject facilities and the allocation of personnel and material to be furnished by each Force.

5.3. The fire control tower on firing ranges shall be under the direction of the Spanish Range Officer. When United States Forces are training, however, a United States Range Safety Officer shall be in the same tower to direct the movement of United States aircraft. To assure communications between the Spanish and United States Officers, the United States Forces will also provide the services of an individual who has ample knowledge of Spanish.

6. Accidents occurring to aircraft of the United States Forces

6.1. In case of accidents occurring to aircraft of the United States Forces in Spanish territory, the Spanish and United States authorities will cooperate in the adoption of rescue measures with primary responsibility belonging to the United States authorities. Measures to take charge of removing the damaged aircraft and its technical equipment shall be the responsibility of the appropriate United States authorities.

6.2. Spanish military or police forces shall have primary responsibility for the external security of such damaged aircraft. However, United States Forces, if first on the scene, may assume this responsibility pending the arrival of Spanish Forces.

6.3. Once Spanish authorities have assumed responsibility for the security of such aircraft, United States technical personnel designated by the United States Forces will have access to the accident scene. These personnel will cooperate fully with the Spanish investigating officer to assure that the scene of the accident is not disturbed in a manner that could prejudice the investigations of the accident by Spanish and United States authorities.

6.4. The investigation of these accidents will be accomplished in accordance with the laws of air navigation of Spain, and will be independent of the investigation to be conducted by United States authorities.

6.5. When an investigation of a particular accident is opened, United States authorities will furnish whatever data and technical assistance are deemed necessary, with the exception of any information considered, because of its nature, to be classified.

7. Air search and rescue

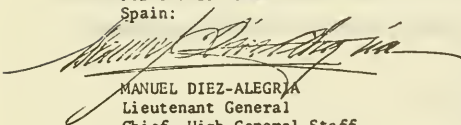
Spanish and United States authorities will cooperate and lend all possible help in air search and rescue activities.

8. Weather service

United States authorities may establish and maintain in each meteorological area such weather stations as are decided on by mutual agreement, establishing a continuing exchange of reports with the Spanish Meteorological Service in accordance with rules and procedures to be established.

MADRID, The 25th of September 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD L. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX VIII
USE OF THE ROTA NAVAL BASE
BY UNITED STATES FORCES

1. The command of the base shall be Spanish under the "Admiral Commanding General of the Naval Base".

2. The provisions of Annex I shall apply to Rota Naval Base.

3. In order to govern the use by the United States Forces of the facilities of the Rota Naval Base referred to in the Exchange of Notes dated 6 August 1970 between the Governments of Spain and the United States, the Admiral Commanding General of the Naval Base shall prepare with the Commander, United States Naval Activities Spain (Rota), the basic rules and procedures which will be consistent with the requirements of both navies.

4. Pursuant to paragraph 3 of this Annex, the rules for movement and use of the port will be established. These rules will be divided in general lines, into two groups:

4.1. Rules for warships will include procedures for notification of arrival, entrance priority, etc.

4.2. Rules for merchant ships. The rules will include the preceding and that relating to pilotage, towage, mooring, sanitation, pratique, cargo manifest, customs, etc.

The above rules will take into account all technical aspects which when complied with, tend to avoid possible interferences, uncompatibility, congestions, risk of accidents, etc.

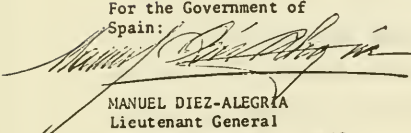
5. Military units within the agreed force levels do not require advance authorization for entries and departures, except for routine notification in the form agreed to in the Basic Rules referred to in paragraphs 3 and 4 of this Annex. Ships of the United States Navy which are not included within the agreed force levels and those ships wholly chartered by said forces can enter and depart the Base in accordance with the rules in Annex IX for visits to Spanish ports.

6. Ships of third nations entering Rota Naval Base will be required to follow the regulations established in accordance with paragraph 3, Article VIII, Section I of the Agreement in Implementation, and in order that the Government of Spain may exercise the right to veto such visits if it desires, authorization for entry must be requested ten days in advance; in exceptional cases this period of time may be reduced.

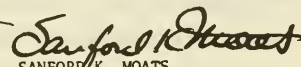
7. In addition to the security measures taken by the Admiral Commanding General of the Naval Base and the Commander, United States Naval Activities in Spain, and in agreement with Annex I, the Admiral Commanding General of the Naval Base will be responsible for the defense of the harbor and coastline by means of a maritime-land watch which will be carried out by Spanish forces.

MADRID, The 25th of September 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD K. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX IXRULES GOVERNING VISITS OF UNITED STATES VESSELSTO SPANISH PORTS

1. This Annex applies to vessels of the United States Navy and vessels chartered wholly by the United States Department of Defense which visit Spanish ports and which are not provided for in paragraph 5 of Annex VIII. These vessels, hereinafter referred to as vessels of the United States Forces, are classified as follows:

1.1. United States naval vessels, either combatant or auxiliary, under the operational control of a United States naval commander.

1.2. Vessels in the service of the United States Navy called United States Naval Ships (USNS) and General Agency Agreement (GAA) ships, both of which are the property of the United States Government, and whose activities are carried out through the Military Sea Transport Service (MSTS).

1.3. Other vessels which are chartered wholly by the United States Department of Defense.

2. Vessels of the United States Forces may enter, operate in, and leave Spanish ports and territorial waters according to the provisions of this Annex.

3. When passing through Spanish jurisdictional waters, submarines must navigate on the surface.

4. Visits or calls are classified and defined as follows:

4.1. Type "A" - Informal visits or calls: Those in which formalities are restricted to the usual salutes and customary calls.

4.2. Type "B" - Operational visits or calls: Those which are primarily for logistical purposes, repairs, or for the performance of operational missions.

4.3. Type "C" - Visits or calls of courtesy: Those which are of formal nature in which there is an exchange of official courtesies and formal entertainment, and require prior arrangements through diplomatic channels.

5. Vessels of the United States Forces may visit and call at Spanish ports, giving the proper notification without further formalities in the case of Type "A" visits. Nothing in the foregoing shall preclude the competent Spanish authorities from disapproving a proposed visit in case of port congestion or other valid reason.

6. Type "B" visits require the authority of the Joint Committee which shall be notified not less than 5 days in advance.

7. Type "C" visits require advance approval, initiated by the Department of Defense, the Chief of Naval Operations, or the designated commanders, and will be processed at the level of Spanish naval commands. Diplomatic clearance will be assumed unless the U. S. Naval Attache is notified to the contrary.

8. Advance notification for Type "A" or Type "B" visits or calls shall be governed by the following:

8.1. The notification shall include, in complete detail, the name of the port or area at which the visit or call is to be made; the names and types of the vessels and whether or not they are

saluting ships; the names of flag officers, unit commanders, masters, military liaison officers on board, and distinguished passengers embarked; the inclusive dates of the visit or call; and classes of privileges desired.

8.2. The United States Naval Attache in Madrid shall notify the Joint Committee and the Spanish naval authorities not less than five days in advance.

8.3. In cases of emergency, including inclement weather, when advance notification cannot be made, the details of the call will be given immediately to the appropriate Spanish naval authorities and the United States Naval Attache.

9. During their stay in Spanish ports or waters, vessels of the United States Forces shall be governed by the following rules:

9.1. All harbor regulations regarding pilotage, sanitation and customs which are applicable to Spanish naval vessels shall be obeyed.

9.2. The charges for port services such as towing, mooring, wharfage and dockage, picking up refuse or garbage, etc, will be levied against vessels of the United States Forces when these services are furnished in accordance with the requirements of present Spanish legislation or when solicited by the visitors. Such charges will not be greater than those applied to ships of the Spanish Navy.

9.3. Vessels of the United States Forces shall be, as in the case of Spanish naval vessels, immune from search, including customs and health. Communicable disease on board, the existence of which may be suspected or known, shall be reported prior to requesting pratique. Personal effects landed from visiting vessels will be subject to declaration and inspection by local customs authorities.

9.4. Passports or visas will not be required for personnel disembarking temporarily from visiting vessels and who are required to go back aboard before the vessel puts out to sea. United States Department of Defense identification papers will be required.

9.5. The wearing of uniforms for visits ashore is authorized.

10. Among the classes or privileges referred to in paragraph 8.1. which will normally be accorded to vessels of the United States Forces, subject to prior notification, are the following:

10.1. Class 1 - Logistics Supplies: This will include fuel and fresh dry provisions which will be furnished to the extent possible available through local sources or as ordered in advance.

10.2. Class 2 - Repairs: Repairs and modifications will be the subject of special arrangements in each case.

10.3. Class 3 - Shore Liberty: Shore liberty will be subject to any restriction which local Spanish naval authorities may impose. Athletic and recreation facilities will be afforded through local military authorities according to established rules and rates.

10.4. Class 4 - Shore Patrols: Unarmed personnel in uniform in order to assist local authorities in maintaining order.

10.5. Class 5 - Training: Utilization of training areas ashore or in territorial waters in such places as may be agreed upon with local commanders.

10.6. Class 6 - Flight Training - This will include the shore basing of aircraft and training flights of ship-based and/or shore-based aircraft, subject to the prior authorization of the Joint Committee in each case.

10.7. Class 7 - Conducted Tours: Authorization for daily or extended tours to Spanish cities.

10.8. Class 8 - Official Transportation: Permission to off-load, operate, and on-load official vehicles during the ship's stay in Spain. Numbers and type of such vehicles will be furnished with the notification.

11. The procedures for the arrival, port movements and furnishing of services, will be established between the Spanish and United States Navies.

11.1. Safe anchorage and pier facilities, including those needed for loading and off-loading stores and personnel, will be assigned to the extent practicable as requested by vessels of the United States Forces.

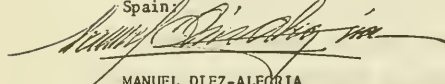
11.2. Local hydrographic information will be furnished when requested.

11.3. The establishment of shore communications services, except normal telephone, telegraph or cable services, will require prior agreement in each case.

12. In the event of unforeseen circumstances not covered by the provisions of the Chapter, it is understood that any vessel of the United States Forces in Spain for the purposes of the Agreement shall be given the same treatment and consideration as a Spanish vessel.

MADRID, The 25th of September 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD K. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX X
COMMUNICATIONS AND ELECTRONICS

1. General

1.1. The United States Forces may use and maintain existing communications-electronic facilities and services referred to in the Exchange of Notes, consistent with the terms of the Agreement of Friendship and Cooperation. The United States Forces may also use and maintain presently existing facilities and services located outside the listed installations, and, if necessary, in such other areas as may be authorized by the Joint Committee.

1.2. In general and where available, however, the Spanish telephone, telegraph and teletype services will be used to meet the requirements of the United States Forces.

1.3. The United States Forces are authorized to use codes, ciphers and other means of cryptographic security.

2. Land Line Communications

2.1. The needs of the United States Forces for land line communications facilities and services will be coordinated with the Spanish Military Forces and civilian communications services. Procedures for assignment of the land line telecommunication facilities and services deemed necessary by the United States will be agreed upon between the

appropriate Spanish military authorities and the United States military authorities through the Joint Committee. Payment for such services shall be made according to the provisions of such agreement.

2.2. In order to permit timely action by the Spanish civil and military telecommunication authorities, those authorities shall be notified as far in advance as possible of the projected requirements of the United States Forces for land line circuits.

2.3. The United States Forces may install, maintain, and operate their own equipment at the terminals of land lines furnished by Spanish agencies. The installed equipment must not cause any interference on other Spanish land lines and shall be suitable for use on circuitry that conforms to recommendations of the International Telegraph and Telephone Consultative Committee (C.C.I.T.T.) and to the conditions established by the Spanish agency concerned.

2.4. When necessary, and when no usable lines exist, telephone, record, and such other intercommunication systems considered necessary for the support of United States military requirements may be installed as authorized by the Joint Committee. If mutually agreed, such systems may be integrated with those of the Spanish Military Forces.

2.5. The United States Forces may install, as authorized by the Joint Committee, control circuits from the installations referred to in the Exchange of Notes to transmitter, receiver and electronic navigational aid facilities located outside the aforesaid installations. The exact routing of land lines for these purposes will be determined by mutual agreement between the appropriate Spanish and United States military authorities.

3. Radio Communications

3.1. The United States Forces are authorized to maintain and utilize the following existing facilities:

3.11. Major radio communication facilities as links with the world-wide military network of the United States;

3.12. Such other lesser radio communications facilities required for the support of military and administrative services of the United States Forces in Spain;

3.13. Radio facilities for communication with United States military aircraft;

3.14. Such other radio broadcasting transmitting stations contributing to the normal welfare and training of the United States Forces, which includes short-range radio broadcasting stations, in accordance with the rules issued on the matter by the Spanish authorities.

3.2. When authorized by the Joint Committee, the United States Forces may also maintain and utilize for their support:

3.21. Satellite communications;

3.22. Television transmitting stations, for the purposes and on the terms specified in sub-paragraph 3.14 above; and

3.23. Such other communications facilities as may be required in the future.

3.3. Transmitter and receiver antennas installed by the United States for the aforesaid purposes shall be located and constructed so as not to constitute a hazard to air navigation.

3.4. The United States Forces are authorized the continued use of the radio frequencies and call signs assigned to them for the operation of communications facilities in Spain. Any changes in existing

frequencies or call signs, and requests for additional frequencies or call signs required for communications facilities in Spain, shall be coordinated, agreed upon and acquired through the normal channels. The Joint Committee shall be informed of any such changes or requests.

4. Control Towers

At the control towers used jointly by the Spanish and United States Forces, the latter will supply and operate the equipment needed to meet their own needs.

5. Aids to Navigation and Approach Control

The United States Forces may use and maintain presently existing electronic navigation and landing aids, such as airport surveillance radar, ground controlled approach (G.C.A.), TACAN and instrument landing systems (ILS), and may install any other such aids as are developed and adapted for such use. If in the future it should become necessary to change or expand the present facilities, this may be done subject to the approval of the Joint Committee.

6. Aircraft Control and Warning System

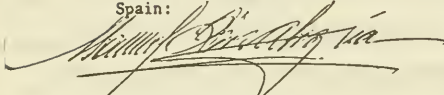
The United States Forces are authorized to utilize the existing Spanish aircraft control and warning system. Rules regarding the use of this system shall be established by the Joint Committee.

7. Weather Facilities

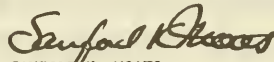
The United States Forces are authorized to maintain and utilize communication equipment in connection with the operation of authorized weather facilities in Spain.

MADRID, The 25th of September 1970

For the Government of
Spain:


 MANUEL DIEZ-ALEGRIA
 Lieutenant General
 Chief, High General Staff

For the Government of
the United States of America:


 SANFORD K. MOATS
 Major General, USAF
 Chief, JUSMG-MAAG

PROCEDURAL ANNEX XIPETROLEUM PRODUCTS PIPELINE

1. DESCRIPTION OF PIPELINE - The Petroleum Products Pipeline is a Spanish military installation described as: a steel pipeline, 485 miles (780 kms) long from Rota Naval Base to La Muela of twelve, ten and eight inch diameter; six pump stations at Rota, El Arahal, Adamuz, Ciudad Real, Loeches and La Muela; and mooring, unloading and transfer facilities at Rota. The Petroleum Products Pipeline consists of the following three sections:

1.1 Section I is that portion of the pipeline beginning with and including the bulk petroleum discharge/loading pier at Rota and continuing to, but not including, the petroleum products manifold located approximately 23 meters west of Pump Station Number 1, Rota.

1.2 Section II is that portion of the pipeline from and including the aforementioned petroleum products manifold at Pump Station Number 1 and continuing to and including Pump Station Number 6, La Muela.

1.3 Section III of the pipeline consists of the terminal storage stations at Loeches, La Muela and El Arahal, and the tubing which connects with the petroleum products storage facilities at Torrejon, Zaragoza and Moron Air Bases, respectively.

2. OPERATION OF SECTION I OF THE PIPELINE

2.1 This section of the pipeline is a facility of the Rota Naval Base which the United States Forces are authorized to maintain and operate (including supervision and programming). The petroleum products receiving facility on the bulk petroleum discharge/loading pier will be available for the use of CAMPSA and will normally be operated by Spanish personnel who will be under the direction of the Rota Naval Base Commander. The expenditures that result from operation and maintenance of the pier will be borne by both governments in proportion to their respective activities in accordance with Article III, Section I of the Agreement in Implementation.

2.2 Port services (pilot, tugs, etc) as well as the use of the pier and priorities for its use, loading or discharging, will be regulated in accordance with those rules agreed upon between the Rota Naval Base Commander and United States Forces as provided for in Procedural Annex VIII.

3. OPERATION OF SECTION II OF THE PIPELINE

3.1 This section of the pipeline is a Spanish military installation, which will be managed, operated and maintained in accordance with the following rules and procedures:

3.11 Phase I - This phase will extend from 26 September 1970 to approximately 1 January 1971. During this period, CAMPSA, on behalf of the Spanish Government, will hire personnel that will be necessary for

the operation of Section II. The United States Forces will operate and maintain Section II throughout Phase I and will institute a training program for such CAMPSA personnel.

3.12 Phase II - This phase will begin upon completion of Phase I and will be completed by approximately 1 April 1971. During this period, the United States Forces will operate and maintain Section II and will complete the training of CAMPSA employees in the operation of Section II of the pipeline.

3.13 Phase III - This phase will begin upon completion of Phase II and will be completed by 1 June 1971. During this period, CAMPSA will operate Section II, including provision of utilities, and the United States Forces will complete the training of CAMPSA personnel in maintenance.

3.14 The time periods mentioned above for Phases I, II and III can be reduced at the request of the Spanish Government in order to expedite the total and efficient administration of the pipeline by CAMPSA. These requests for reduction will be forwarded by the Spanish Government to the United States Forces a minimum of one month in advance.

3.2 At the completion of Phase III, the Spanish Government will be fully responsible for the operation and maintenance of Section II of the pipeline and will ensure that the necessary spare parts and equipment are on hand to enable efficient operation and maintenance of Section II.

The United States Forces will transfer to the Spanish Government, on appropriate terms which reflect their condition, the spare parts and equipment on hand that are peculiar to Section II of the pipeline and necessary for its operation and maintenance in accordance with specifications of the United States Forces. The Spanish Government may request from the United States Forces any other spare parts or equipment associated with Section II of the pipeline subject to determination of need and mutually acceptable sales conditions.

3.3 The Spanish Government will reimburse the United States Forces for all costs incurred during Phases I, II and III relative to the operation and maintenance of Section II of the pipeline, including personnel costs.

4. MOVEMENT OF UNITED STATES FORCES PRODUCT THROUGH SECTION II OF THE PIPELINE - For such period of time as the Agreement of Friendship and Cooperation is in force, Spain guarantees at no cost to the United States:

4.1 Movement and storage of normal petroleum product requirements of the United States Forces through Section II of the pipeline.

4.2 Operation and maintenance of Section II of the pipeline.

4.3 The availability of expanded use of Section II of the pipeline for requirements of the United States Forces in case of emergency; provided, however, that the United States Forces shall reimburse CAMPSA for the

movement of such United States Forces product, exclusive of product destined for use by the Spanish Forces and product moved through Section II for the sole purpose of pushing other product, as is in excess of 380,000,000 barrel-miles moved during any calendar quarter (January-March, April-June, July-September, October-December) at a rate of \$0.0013, or its equivalent in pesetas, per barrel-mile. (A barrel consists of 42 United States gallons at 15 degrees centigrade).

5. PRIORITY OF MOVEMENTS - Movement of United States Forces product through the pipeline will be given equal priority with the movement of Spanish military product and both will take precedence over commercial product movements. To avoid interferences with the movement of commercial products, the United States Forces will, one month in advance, advise of their requirements for the following month.

6. QUALITY AND QUANTITY CONTROL - The pipeline is for the movement of refined products only and under no circumstances will crude products be moved through the pipeline. After the completion of Phase II, quality and quantity control of United States Forces products moved through Section II of the pipeline will be the responsibility of CAMPSA, using standards and procedures agreed upon by the Mixed Technical Commission established under paragraph 16 of this Annex. United States and Spanish technical personnel will have the right of access to pipeline facilities to coordinate pipeline movements and product quality and quantity control procedures.

7. CUSTODY - After the completion of Phase II, CAMPSA shall have custody of United States Forces product whenever it is in Section II of the pipeline.

8. TESTING AND MEASURING - United States Forces product shall be tested and measured prior to its acceptance by CAMPSA for custody and after its subsequent delivery to the United States Forces, in accordance with procedures established by the Mixed Technical Commission. In measuring the quantity of United States Forces product accepted and delivered, correction shall be made from volume at actual or observed temperature to volume at 15 degrees centigrade.

9. DELIVERY OF UNITED STATES FORCES PRODUCTS - CAMPSA shall transport through Section II of the pipeline and deliver into storage facilities designated by the United States Forces the quantity of United States Forces product accepted into its custody, except as otherwise provided in paragraph 10 of this Annex. The delivered product shall meet United States military specifications. Delivery shall be accomplished in accordance with time schedules established by the Mixed Technical Commission.

10. LOSSES OR CONTAMINATION OF UNITED STATES FORCES PRODUCT - United States Forces product lost or contaminated while in CAMPSA custody shall be either replaced in kind by the Spanish Government or reimbursement therefor made to the United States Forces based on the cost of the product to the United States Forces; provided that the Spanish Government shall not be liable for any loss or contamination of United States Forces product caused by acts of God or war. Normal evaporation losses encountered in gauging of shipping and receiving tanks and products withdrawn for sampling purposes, as agreed to in the Mixed Technical Commission, shall be deducted when computing any possible fuel losses to be replaced by the Spanish Government.

11. CLAIMS - During Phases I, II and III and thereafter, the Spanish Government will assume responsibility for the settlement and payment of any claims arising out of the operation and maintenance of Section II of the pipeline that could be made against the Government of the United States or members of "United States personnel in Spain," except for claims arising out of acts of intentional misconduct or gross negligence of said personnel when determined as such by the Joint Committee. Claims arising out of acts of intentional misconduct or gross negligence by said personnel shall be handled in accordance with the provisions of Section II of the Agreement in Implementation.

12. LABOR MATTERS - Spanish employees of the United States Forces engaged in work on Section II of the pipeline upon the entry into force of the Agreement in Implementation shall have the option of remaining on the pipeline as CAMPSA employees. Such employees shall not be considered as "local labor personnel" under Section III of said agreement, unless having declined the option of remaining on the pipeline as CAMPSA employees, they are able to qualify for such vacancies as may exist in "local labor personnel" positions at other installations and immediately enter into such employment. Those Spanish employees choosing to remain on the pipeline as CAMPSA employees, as well as those who neither remain on the pipeline as CAMPSA employees nor are employed as "local labor personnel" at other installations, shall receive severance pay from the United States Forces under the terms and conditions prevailing prior to the entry into force of the Agreement in Implementation.

13. OPERATION OF SECTION III OF THE PIPELINE - In accordance with the Exchange of Notes of August 6, 1970 between the Governments of the United States and Spain, the United States Forces are authorized to use, operate and maintain Section III of the pipeline.

14. ULLAGE - When determined to be available by the United States Forces, ullage will be provided CAMPSA in the terminal storage stations at Loeches, La Muela and El Arahal, on a temporary basis to accommodate pipeline movements in an emergency or other unusual situation. Because of potential damage to empty underground storage tanks due to water table levels, such ullage will be kept available in partially filled tanks. The United States Forces shall not be responsible for any CAMPSA product degradation resulting from the provision of ullage in these tanks. If such ullage must be used to accommodate United States Forces product movements, the Spanish Government shall not be responsible for any United States Forces product degradation resulting from commingling of product. If such ullage must be used to accommodate Spanish military or CAMPSA product movements, the Spanish Government shall be responsible for any United States Forces product degradation and shall replace in kind, or otherwise compensate the United States Forces for such degradation.

15. UTILITIES FOR STORAGE FACILITIES - Electrical power and water from the utility systems at the respective pipeline pump stations will be provided by the Spanish Government to the terminal storage stations at Loeches, La Muela and El Arahal at no cost to the United States Forces.

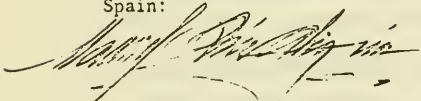
16. MIXED TECHNICAL COMMISSION - A Mixed Technical Commission is hereby established. The commission shall be composed of technical experts of the

United States Forces and the Spanish Government, and shall prepare the detailed plans necessary for the transfer of responsibility for the operation and maintenance of Section II of the pipeline to the Spanish Government. This commission will remain in existence so long as the United States Forces utilize the pipeline and will serve to coordinate the requirements of the United States Forces and the Spanish Government for pipeline utilization. Any disagreements of the Mixed Technical Commission will be referred to the Joint Committee for resolution.

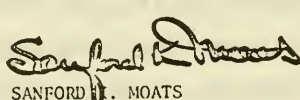
17. EFFECTIVE DATE - Upon signature by both Parties, this Annex shall be applied retroactively from September 26, 1970.

MADRID, The 18th of December 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD H. MOATS
Major General, USAF
Chief, JUSMG-MAAG

PROCEDURAL ANNEX XIIUTILIZATION OF PETROLEUM PRODUCTS AND FACILITIES

1. In accordance with the Exchange of Notes of August 6, 1970, between the Governments of the United States and Spain, the United States Forces are authorized to use the following petroleum products facilities at Spanish military installations:

1.1 El Ferrol - La Grana. Fuel storage depot with tunnels divided into fourteen tanks and related services.

1.2 Cartagena - San Pedro. Fuel storage depot with two tunnels which have six underground storage facilities and fifteen metal storage facilities with related services, including a pumping station and an underground emergency power plant.

1.3 Rota Naval Base. Fuel storage depot on the naval base with twenty-eight large fuel tanks located at the southeast end of the base and nineteen miscellaneous tanks, with related services. Some of these tanks are reserved for the storage of United States Air Force petroleum products.

1.4 Air Base Facilities. Petroleum products storage facilities at Torrejon, Zaragoza, and Moron Air Bases.

2. The naval petroleum products stored in the facilities at El Ferrol - La Grana, Cartagena - San Pedro, and Rota Naval Base will be considered as reserved for the United States and Spanish Navies.

3. United States Forces petroleum products stored in the facilities at Torrejon, Zaragoza and Moron Air Bases will, when stocks exist, be issued to Spanish Air Force refueling vehicles upon request of said Air Force. The Spanish Government will reimburse the United States Forces in kind the amounts of such products received, adding 3.5 percent of the quantity received as reimbursement for the administrative costs incurred. Such reimbursement will be made in accord with United States military specifications. Representatives of the Air Forces of both countries will enter into appropriate arrangement to implement the provisions of this paragraph covering the procedures for replacement in kind.

4. The United States Forces will be responsible for the operation, management and maintenance of the petroleum products facilities listed in Paragraph 1 of this Annex. This responsibility includes the supervision and control of the quality and quantity of United States Forces petroleum products as well as the development and implementation of applicable technical safety instructions.

5. The following procedures will be observed at the naval facilities described in subparagraphs 1.1, 1.2 and 1.3 of this Annex:

5.1 Ship entry and exit at the El Ferrol and Cartagena Naval Bases will be governed by the provisions established in Paragraph 4.2 of Annex IX. Ship entry and exit at the Rota Naval Base will be governed by the provisions established in accordance with Paragraphs 3 and 4 of Annex VIII.

5.2 The moorage and the use of the piers designated to serve the petroleum facilities authorized for use by the United States will be regulated according to a schedule prepared by the Spanish installation commander in conjunction with the Commander, United States Naval Activities Spain (Rota), in accordance with the needs of both Navies. Normally military ships or ships carrying military cargo will have priority over commercial ships.

5.3 Other piers which could be used indirectly for the movement of petroleum products to the storage facilities made available to the United States may be used when necessary as authorized by the Spanish Commander.

5.4 Pier management at El Ferrol - La Grana and Cartagena - San Pedro, which will be the responsibility of the Spanish Commander, will include the establishment of technical safety instructions. These safety instructions will be developed in conjunction with the Commander, United States Naval Activities Spain (Rota).

6. The Spanish Navy may store petroleum products for use by both Navies in tanks administered by the United States Forces at the naval facilities described in subparagraphs 1.1, 1.2, and 1.3 of this Annex on a schedule agreed upon by the United States and Spanish Navies when such products are compatible with applicable United States military specifications. A surface tank will be reserved for Spanish use at El Ferrol (La Grana) wherein products of any category may be stored. Correspondingly, when it is necessary for the United States Navy to either store or refuel in any Spanish petroleum products installation not listed in paragraph 1 of this Annex, a request will be made to the Joint Committee.

7. The cost of operation and maintenance of the petroleum products facilities listed in Paragraph 1 of this Annex will be borne by the United States Government or shared by both Governments, as the case may be, in accordance with paragraphs 3.3 and 3.4 of Procedural Annex I, and Article III in Section I of the Agreement in Implementation.

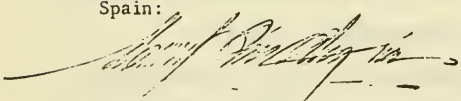
8. The Spanish Navy may acquire for its use petroleum products from the United States Navy at the naval facilities listed in subparagraphs 1.1, 1.2, and 1.3 of this Annex at a price and in the conditions agreed to by appropriate authorities of both Governments or by replacement in kind in accordance with United States military specifications.

9. If at any time it becomes necessary for Spanish Air Force aircraft to be refueled directly by United States Forces at any United States facility listed in paragraph 1 of this Annex, such refueling will be accomplished, subject to payment in cash or replacement in kind, in accordance with United States military regulations and specifications.

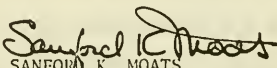
10. Upon signature by both parties, this Annex shall be applied retroactively from September 26, 1970.

MADRID, The 18th of December 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD K. MOATS
Major General, USAF
Chief, JUSNG-MAAG

PROCEDURAL ANNEX XIII
RULES GOVERNING CONSTRUCTION CONTRACTS
WITH SPANISH CONTRACTORS

1. In accordance with Article VII of the Agreement in Implementation, the United States Forces may award contracts to Spanish or United States prime contractors for the execution of construction or improvement projects in Spain. Consistent with the requirements of the contract, the services of Spanish contractors shall be used, directly or through a United States prime contractor, provided the Spanish contractor fulfills the required conditions of the contract, which shall be made public, except in special cases which shall be communicated to the Joint Committee.
2. Spanish contractors may be selected from those qualified to carry out the project either directly or by competitive bidding or through a United States prime or participating contractor.
3. When selecting a Spanish contractor, the United States Forces will give the opportunity to bid to the largest possible number of contractors, reserving the right, however, of selecting the contractor considered to be the best qualified, price and other factors considered.

4. The Spanish prime contractors or those Spanish contractors selected through a United States prime or participating contractor have to be listed in the Register of Contractors of the Spanish Treasury Ministry with the classification applicable to the type of projects to be performed, in accordance with the requirements of a similar project which might be contracted for by the Spanish government.

5. Invitations to bid, or bid specifications, should contain, in the greatest detail:

- a) The scope of construction
- b) The quality of material to be used
- c) The detailed plans of the project
- d) Broad range of estimated cost
- e) The maximum period of time or completion date for carrying out the project

A sample of the bid specifications or bid offers will be given to the Spanish command of the installation, and another will be sent to the Joint Committee.

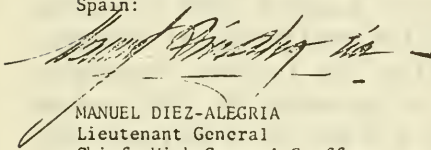
6. When a contract has been awarded, this fact will be communicated to the Joint Committee, together with a summary of the terms of the award.

7. When it is not feasible to carry out the project through the procedures of paragraphs 1, 2 or 3 of this Annex, the Joint Committee may, as an exception, authorize contracting with firms from third countries, in all cases reserving the right to approve the contract award made by U. S. authorities in such cases.

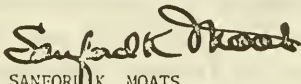
8. If a Spanish contractor does not fulfill the conditions of his contract, the United States Forces will inform the Joint Committee of this fact, without prejudice to civil actions which might apply."

MADRID, The 18th of December 1970

For the Government of
Spain:


MANUEL DIEZ-ALEGRIA
Lieutenant General
Chief, High General Staff

For the Government of
the United States of America:


SANFORD K. MOATS
Major General, USAF
Chief, JUSMG-MAAG

*MADRID, September 25, 1970.***EXCELLENCY:**

I have the honor to refer to your note of this date which reads in translation as follows:

"I have the honor to refer to the recent discussions between representatives of our two Governments regarding the continuation of relief from taxes and customs duties for the United States Forces in Spain pending the conclusion of appropriate fiscal agreements under the Agreement of Friendship and Cooperation of August 6, 1970.

In this connection, I have the honor to propose to Your Excellency that during the interim period the United States Forces in Spain and their personnel continue to be accorded in Spain the same customs and taxes treatment which they have enjoyed prior to September 26, 1970.

To this end, and in consonance with the provisions of the exchange of notes between the Minister of Foreign Affairs of Spain and the Secretary of State of the United States on August 6, 1970, in relation to the Agreement in Implementation, the fiscal provisions contained in Articles XV, XIX, XX and XXI of the Technical Agreement annexed to the Defense Agreement of September 26, 1953, and in its Procedural Agreements Number 5, 8, 9 and 12, as well as in any other fiscal provision agreed between the two Governments under the Defense Agreement of September 26, 1953, that is currently in force and from which fiscal rights or obligations of the United States Forces in Spain and their personnel derive, will continue in force. All of these fiscal provisions shall apply to the same personnel to whom they are applicable to this date, and they shall continue in force until the conclusion of the new fiscal agreements.

Negotiation of these agreements under the Agreement of Friendship and Cooperation of August 6, 1970, will be undertaken within a reasonable period of time, with a view toward their early conclusion.

I have the honor to propose to Your Excellency that if the foregoing is acceptable to the Government of the United States, this note and Your Excellency's note in reply shall constitute an agreement between our two Governments on this matter."

I wish to advise you that the Government of the United States agrees that your note, together with this reply, constitute an agreement between our two Governments regarding the continuation of relief from taxes and customs duties for the United States forces in Spain.

Accept, Excellency, the assurances of my highest consideration.

ROBERT C. HILL

Ambassador

His Excellency

GREGORIO LOPEZ BRAVO,

Minister of Foreign Affairs of Spain.

No. 821

MADRID, *September 25, 1970.*

EXCELLENCY:

I have the honor to refer to your note of this date which reads in translation as follows:

"I have the honor to refer to the recent discussions between representatives of our two Governments regarding the Tax Relief Annex attached to the Mutual Defense Assistance Agreement between our two Governments signed on September 26, 1953. [1]

The Government of Spain is desirous of negotiating an amendment to the said Tax Relief Annex. It is the understanding of my Government that the Government of the United States of America is willing to enter into such negotiations towards this end as soon as may be mutually convenient.

It is understood that until such time as it may be amended, the tax relief authorized in Article III of the Mutual Defense Assistance Agreement of September 26, 1953, and the Technical Annex thereto, shall apply *mutatis mutandis* to the defense operations and expenditures of the United States Government in Spain in furtherance of Chapter VIII of the Agreement of Friendship and Cooperation of August 6, 1970, and agreements concluded thereunder.

If the foregoing is acceptable to the Government of the United States, I have the honor to propose that this note and Your Excellency's reply note to that effect shall constitute an agreement between our two Governments on this matter."

I wish to advise you that the Government of the United States agrees that your note, together with this reply, constitute an agreement between our two Governments relating to the Tax Relief Annex attached to the Mutual Defense Assistance Agreement signed September 26, 1953.

Accept, Excellency, the assurances of my highest consideration.

ROBERT C. HILL
Ambassador

His Excellency

GREGORIO LOPEZ BRAVO,
*Minister of Foreign Affairs
of Spain.*

¹ TIAS 2849; 4 UST 1887.

MADRID, *September 25, 1970.*

EXCELLENCY:

I have the honor to refer to your note of this date which reads in translation as follows:

"With reference to the Agreement in Implementation of Chapter VIII of the Agreement of Friendship and Cooperation between Spain and the United States of America signed on August 6, 1970, and for due compliance with its purposes, I have the honor to communicate to Your Excellency the following understanding of my Government:

1. Active duty military personnel of the armed forces of the United States, and their dependents who accompany them, who are temporarily in Spanish territory on a private visit, shall be fully subject to Spanish law and jurisdiction except as otherwise expressly provided in this note.

2. The provisions of paragraph 3 of Article XIII of the Agreement in implementation shall be applicable to the military personnel covered by this note, except that the military orders to which the said Article refers shall be replaced by an official document issued by the military authorities of the United States containing a certification in the Spanish language that the trip to Spain has been authorized by the commander of the unit to which the bearer belongs. The dependents who accompany the military personnel covered by this note shall be subject to the ordinary system of passports in force under Spanish law, although they shall be exempt from the provisions of that legislation referring to visas and alien registration.

3. The persons referred to in paragraph 1 of this note may use the services of the United States Forces in Spain referred to in Articles XI and XII of the Agreement in Implementation.

4. (a) The Spanish authorities shall immediately notify the military authorities of the United States of the arrest in Spain of any of the persons referred to in paragraph 1 of this note.

(b) In order that the military authorities of the United States may maintain the good order and discipline of the persons referred to in paragraph 1 of this note, the Government of Spain shall refuse them entry into Spanish territory unless they are in possession of the authorization mentioned in paragraph 2 of this note. With the assistance of the military authorities of the United States, the Government of Spain, within its legal authority, shall proceed to expel from Spanish territory the military personnel covered by this note whose authorization to be in Spain has been withdrawn by the military authorities of the United States, or who are otherwise accused of an offense solely against the military law of the United States, except in cases where a person has been charged by the Spanish authorities, in which case the person's expulsion shall be deferred until the charges are resolved.

(c) Likewise, Spain authorizes the military authorities of the United States to exercise jurisdiction over the military personnel covered by this note with respect to offenses committed in Spanish territory solely against the persons or property of United States personnel in Spain, as defined in the Agreement in Implementation, or solely against the public property of the United States in Spain, used in connection with Chapter VIII of the Agreement of Friendship and Cooperation.

(d) The trial safeguards common to the law of Spain and the law of the United States, which are numbered 1 to 16 and are listed in Article XXIII of the Agreement in Implementation as being among those recognized for the case of a member of the United States personnel in Spain, as defined in the said Agreement, shall be applicable

to the persons covered by paragraph 1 of this note who are prosecuted under the jurisdiction of Spain.

5. Notwithstanding the provisions of paragraph 4 of this note, and on a reciprocal basis, the authorities of Spain and the military authorities of the United States may request from and grant to each other, through the appropriate authorities, the right to exercise jurisdiction in any exceptional case involving a member of the military personnel covered by this note, in accordance with the following rules:

a. (1) At the request of the military authorities of the United States with respect to offenses not referred to in paragraph 4.c. of this note and over which the United States is especially interested in exercising jurisdiction;

(2) At the request of the authorities of Spain, with respect to offenses referred to in paragraph 4.c. of this note and over which Spain is especially interested in exercising jurisdiction.

b. The requests referred to in this paragraph shall be submitted in writing within no more than fifteen days from the time of notification to requesting authorities of the arrest of a member of the military personnel covered by this note. Such requests shall be acted upon within no more than thirty days from the date submitted; if no decision is made within that period, the request shall be considered to have been denied.

6. The military authorities of the United States will, at their request, maintain custody of a member of the military personnel covered by this note over whom Spanish jurisdiction is to be exercised as a result of the application of the provisions of paragraph 5.a(2) of this note. As to other members of the military personnel covered by this note over whom Spanish jurisdiction is to be exercised, the United States military authorities may, in cases of special interest, submit requests for custody to the competent Spanish authorities for their consideration. Any custody by the United States military authorities pursuant to this paragraph shall be governed by the provisions of paragraph 3 of Article XVIII of the Agreement in Implementation.

If your Government concurs in the foregoing, I have the honor to propose that this note and Your Excellency's reply note to that effect shall constitute an agreement between our two Governments on this matter."

I wish to advise you that the Government of the United States agrees that your note, together with this reply, constitute an agreement between our two Governments regarding active duty military personnel of the armed forces of the United States, and their depend-

ents who accompany them, who are temporarily in Spanish Territory on a private visit.

Accept, Excellency, the assurances of my highest consideration.

ROBERT C. HILL

Ambassador

His Excellency

GREGORIO LOPEZ BRAVO,

Minister of Foreign Affairs of Spain.

No. 823

MADRID, *September 25, 1970.*

EXCELLENCY:

With reference to the Agreement of Friendship and Cooperation between Spain and the United States signed on August 6, 1970, and to the discussions held between representatives of our two Governments regarding the status of members of the armed forces of Spain who, accompanied by their dependents, are posted to the United States for official purposes in connection with the cooperation for defense provided for in Chapter VIII of the aforesaid Agreement, I have the honor to communicate to Your Excellency the following understanding of my Government.

1. Members of the armed forces of Spain, and their dependents, who are residing in the immediate vicinity of Washington, D.C., and are assigned to the Embassy of Spain in Washington for the aforesaid purposes shall, at the request of the Spanish Government, be recognized by the Government of the United States as Spanish diplomatic personnel, and shall enjoy all the privileges and immunities recognized for the diplomatic personnel of the Embassy of Spain of similar rank.

2. In those cases where the recognition of diplomatic status for the persons referred to in paragraph 1 of this note is not requested by the Spanish Government as well as in other cases where members of the armed forces of Spain are posted to the United States for the aforesaid purposes, the appropriate authorities of the United States shall, at the request of the Spanish Government, and to the extent permitted by United States law, give every consideration in individual cases to requests by the Government of Spain for the waiver of United States jurisdiction, and, in this connection, shall, as appropriate, request such waiver by the competent Federal, State, or local authorities in the United States to the Spanish military authorities of jurisdiction with

respect to offenses which are committed by members of the armed forces of Spain within United States territory and punishable under the law of Spain. When such a waiver of jurisdiction is granted, the appropriate Spanish military authorities shall cause such individual to be removed from United States territory. Any trial or imposition of punishment by Spanish authorities will take place outside United States territory.

3. To the extent permitted by United States law and regulations, the Government of the United States shall grant to the personnel referred to in this note the privileges recognized in United States territory for members of the armed forces of other countries with respect to the use of commissaries, medical facilities, recreational organizations, and other similar activities of the armed forces of the United States.

If your Government concurs in the foregoing, I have the honor to propose that this note and Your Excellency's reply note to that effect shall constitute an agreement between our two Governments on this matter.

Accept, Excellency, the assurances of my highest consideration.

ROBERT C. HILL
Ambassador

His Excellency
GREGORIO LOPEZ BRAVO,
*Minister of Foreign Affairs
of Spain.*

*Translation*MADRID, *September 25, 1970.*

THE MINISTER OF FOREIGN AFFAIRS

EXCELLENCY:

I have the honor to refer to Your excellency's note of this date, the text of which, translated into Spanish, reads as follows:

[For the English language text, see foregoing note]

I wish to inform Your Excellency that the Government of Spain, signifies its agreement that Your Excellency's note and this reply shall constitute an agreement between our two Governments regarding the status of members of the armed forces of Spain who, accompanied by their dependents, are posted to the United States for official purposes in connection with the cooperation for defense provided for in Chapter VIII of the Agreement of Friendship and Cooperation between our two countries.

I avail myself of this opportunity, Mr. Ambassador, to renew to Your Excellency the assurances of my highest consideration.

GREGORIO LOPEZ BRAVO

His Excellency

ROBERT C. HILL,

*Ambassador of the**United States of America
to Spain.*

CONTINUED STATIONING OF AMERICAN
FORCES AT LAJES BASE, AZORES

Agreement Between the
UNITED STATES OF AMERICA
and PORTUGAL

Supplementing the Agreement of September 6, 1951,
as Supplemented

Effected by Exchange of Notes
Signed at Brussels December 9, 1971



PORTUGAL

**Continued Stationing of American Forces
at Lajes Base, Azores**

*Agreement supplementing the agreement of September 6, 1951,[¹]
as supplemented.*

Effected by exchange of notes

Signed at Brussels December 9, 1971;

Entered into force December 9, 1971.

*The Secretary of State to the Portuguese Minister of Foreign Affairs**December 9, 1971*

EXCELLENCY :

I have the honor to acknowledge receipt of Your Excellency's note dated December 9, 1971, which reads as follows :

"I have the honor to refer to the letter of the Foreign Minister of Portugal to the Ambassador of the United States of America, dated December 29, 1962, and to the notes of this Ministry and of your Embassy, dated January 6, 1969, and February 3, 1969, [¹] respectively, relating to the conversations regarding the continued stationing of American forces and personnel at Lajes Base in the Azores and its use by the same.

"I have the honor to propose that the continued use by American forces of the facilities at Lajes Base be authorized by the Government of Portugal for a period of five years dating from February 3, 1969. The continued use of such facilities will be regulated by the mutual arrangements affirmed and described in the letter of the Foreign Minister of Portugal dated December 29, 1962. Either party may propose the commencement of conversations regarding use of such facilities beyond the period described in this note six months before the expiration of such period, but no determination that a negative result has arisen in such conversations shall be made for at least six months fol-

¹ Not printed.

lowing the expiration of such period. In the event neither party proposes the commencement of further conversations, a negative result shall be deemed to have arisen upon the expiration of the period described in this note.

"I should like to propose that, if agreeable to your Government, this note, together with your reply, shall constitute an agreement between our two Governments."

I confirm to you that the above quoted proposal is acceptable to the Government of the United States, and that Your Excellency's note and this reply shall be regarded as constituting a formal agreement between the two Governments.

Accept, Excellency, the assurances of my highest consideration.

WILLIAM P ROGERS

*Secretary of State of the
United States of America*

His Excellency

RUI PATRICIO,

*Minister of Foreign Affairs
of Portugal.*

DEPLOYMENT IN BAHRAIN OF THE
UNITED STATES MIDDLE EAST FORCE

Agreement Between the
UNITED STATES OF AMERICA
and BAHRAIN

Effected by Exchange of Notes
Signed at Manama December 23, 1971



BAHRAIN

Deployment in Bahrain of the United States Middle East Force

*Agreement effected by exchange of notes
Signed at Manama December 23, 1971;
Entered into force December 23, 1971.*

*The American Chargé d'Affaires ad interim to the Bahraini Minister
of Foreign Affairs*

EMBASSY OF THE
UNITED STATES OF AMERICA

MANAMA, BAHRAIN
December 23, 1971

His Excellency
Shaikh Mohammad bin Mubarak al-Khalifa
Minister of Foreign Affairs
Government of the State of Bahrain

EXCELLENCY:

I have the honor to refer to the present deployment in Bahrain of the United States Middle East Force, including its flagship and other vessels and aircraft. The United States Government proposes to maintain this presence and its related support facilities subject to the following arrangements:

1. Vessels and aircraft assigned to or supporting the United States Force may freely enter and depart the territorial waters, ports, and airfields of Bahrain;

2. Members of the United States Force will be allowed freedom of movement within Bahrain and freedom of entry to and egress from Bahrain;

3. If there is any substantial change contemplated by the United States Government in the deployment of vessels or aircraft or numbers of personnel to be supported on Bahrain in connection with the United States Middle East Force, the United States Government will consult with the Government of Bahrain before effecting that change;

4. Passport and visa requirements shall not be applicable to military members of the United States Force except as shall be agreed upon

between the two governments. All members of the United States Force, however, shall be furnished with appropriate identification which shall be produced, upon demand, to the appropriate authorities of the Government of Bahrain. Members of the United States Force will be exempt from immigration and emigration inspection on entering or leaving Bahrain, and from registration and control as aliens, but will not by reasons of their entry into Bahrain be regarded as acquiring any rights to permanent residence in Bahrain;

5. Members of the United States Force will respect the laws, customs and traditions of Bahrain, and abstain from activity inconsistent with the spirit of these arrangements. The authorities of the United States will take necessary measures to that end;

6. Members of the United States Force shall not be subject to taxation on their salary and emoluments received from United States sources or on any other tangible movable property which is present in Bahrain due to their temporary presence there;

7. The authorities of Bahrain will accept as valid, and without a driving test or fee, driving licenses or military driving permits issued by the authorities of the United States to members of the United States Force;

8. The authorities of the United States will pay just and reasonable compensation in settlement of civil claims (other than contractual claims) arising out of acts or omission of members of the United States Force done in the performance of official duty or out of any other act, omission or occurrence for which the Force is legally responsible. All such claims will be expeditiously processed and settled by the authorities of the United States in accordance with United States law;

9. The United States Force and its members may import, into Bahrain, without license or other restriction or registration and free of customs, duties and taxes, equipment, supplies, household effects, motor vehicles and other items required by the Force or for the personal use of the members of the Force. Any items imported under this paragraph may be exported freely without customs, duties, and taxes. However, any property of any kind imported entry free under this paragraph which is sold in Bahrain to persons other than to those entitled to duty free import privileges shall be subject to customs and other duties on its value at the time of sale.

10. Personal purchases by members of the United States Force from Bahraini sources shall not be exempt from Bahraini customs, duties and taxes except for certain articles to be agreed upon between the two governments;

11. The Government of Bahrain shall exercise civil jurisdiction over members of the United States Force, except for those matters

arising from the performance of their official duties. The Government of the United States shall exercise criminal jurisdiction over members of the United States Force. In particular cases, however, the authorities of the two governments may agree otherwise;

12. The term "members of the United States Force" means members of the Armed Forces of the United States and persons serving with, or employed by said Armed Forces, including dependents, but excluding indigenous Bahraini nationals and other persons ordinarily resident in Bahrain territory, provided that such nationals or other persons are not dependents of members of the United States Force;

13. The occupancy and use of the support facilities required by the United States Force will be governed by administrative arrangements between the United States authorities and the authorities of Bahrain or, as appropriate, private property owners;

14. Should either government determine at some future time that it is no longer desirable to continue the presence on Bahrain of the United States Middle East Force, the United States shall have one year thereafter to terminate its presence.

If the foregoing is acceptable to the Government of Bahrain, I have the honor to propose that this note and your note in reply confirming acceptance will constitute an agreement between our respective governments regarding this matter.

Accept, Excellency, the assurance of my highest consideration.

JOHN N. GATCH JR.

John N. Gatch, Jr.
Charge d'Affaires ad interim

*The Bahraini Minister of Foreign Affairs to the American Chargé
d'Affaires ad interim*

STATE OF BAHRAIN
MINISTRY OF FOREIGN AFFAIRS

December 23, 1971

John N. Gatch, Jr.
Charge d'Affaires ad interim
Embassy of the United States of America
Manama, Bahrain

SIR:

I have the honour to acknowledge the receipt of your note dated December 23, 1971, reading as follows;

[For the text, see foregoing note.]

It is my pleasure to inform you that the Government of Bahrain agrees to all that was said in this note.

Accept, Sir, the assurance of my highest consideration.

[SEAL]

M KHALIFA

Mohammad bin Mubarak al-Khalifa
Minister of Foreign Affairs
Government of Bahrain

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON SEPARATION OF POWERS,
Washington, D.C. March 30, 1972.

(Letter addressed to Departments and Agencies of the Federal Government)

DEAR MR. SECRETARY: The Subcommittee on Separation of Powers is presently examining executive-legislative relations in foreign affairs with special emphasis on executive agreements. Because of the separation of powers problems involved, the Subcommittee will hold hearings April 17, 18, 19, and 20, 1972.

It has come to the attention of the Subcommittee that Government agencies routinely enter into executive agreements with foreign states. It would be helpful to our study if you would provide us with a list of all executive agreements, since World War II, in which your department has participated, along with the purpose of and authority for the agreements. Although it may be a large undertaking, I would greatly appreciate receiving your report by April 7, 1972, since it is necessary for the Subcommittee to have this information by that date in order to study it before the hearings begin.

I thank you very much for your cooperation and assistance.

With all kind wishes, I am

Sincerely yours,

SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers.

ACTION, APRIL 7, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your March 30, 1972, letter regarding executive agreements the Peace Corps has entered into with foreign states since it was created in 1961.

The Peace Corps has entered into program agreements with more than 50 foreign states since 1961. I am enclosing a list of these countries and the dates those agreements were signed. Our agreements with foreign states are negotiated in the following manner.

Once it appears that the potential host country desires the Peace Corps to send Volunteers and that agreement will be reached on one or more specific projects, the Peace Corps initiates a request for Department of State approval for the American Ambassador to enter into program agreement negotiations with the host government. In requesting the Department of State to enter into negotiations for the program agreement, the Peace Corps follows the guidelines contained in Department of State Circular No. 175 relating to, among other things, the Executive Agreement-Making Power of the United States.

Peace Corps program agreements generally are effected by an exchange of notes between the American Ambassador and a high ranking official of the host country government. The agreements, with an official translation, are then printed in the Department of State's *Treaties and Other International Acts Series (TIAS)*. I am advised by the Office of Treaty Affairs of the Department of State that an analysis of international agreements entered into by the United States from 1946 until April 1, 1972, has been forwarded to the Subcommittee, and that this analysis contains references to all the Peace Corps program agreements which have been signed since 1961. For your information, I am enclosing several representative examples of our program agreement. As much as possible we endeavor to make these agreements identical for each country in which the Peace Corps serves. If you would like a complete compilation of each program agreement that we have signed since 1961, please let me know.

In addition to program agreements effected by an exchange of notes, the Peace Corps frequently enters into project arrangements with host country Government Ministries and Departments for the support of individual Volunteers and projects. For example, the local Peace Corps Director may enter into an agreement with the Ministry of Education in a foreign state to provide that the Ministry will undertake to provide Volunteers with housing, supplies, and other appropriate necessities. These agreements are signed frequently, and

at many levels depending on the project and country involved. They may relate to the support and duties of an individual Volunteer or a group or groups of Volunteers providing specified Volunteer services. I am enclosing several examples of this type of agreement for your information.

I hope the above information will be sufficient for your purposes. Please do not hesitate to contact me if I can provide you with any further information.

Sincerely yours,

JOSEPH H. BLATCHFORD, *Director.*

EXECUTIVE AGREEMENTS WITH FOREIGN STATES TO ESTABLISH PEACE CORPS PROGRAMS

<i>Country</i>	<i>Date Program Agreement Signed</i>
Afghanistan.....	September 6 and 11, 1962.
Antigua.....	December 19 and 28, 1966.
Barbados.....	July 15 and August 9, 1965.
Bolivia.....	June 19, 1962.
Botswana.....	May 14, 1971.
Brazil.....	November 11, 1961.
British Honduras.....	July 26 and August 15, 1962.
Burundi.....	(Presently being negotiated.)
Cameroon.....	July 23 and September 10, 1962.
Central African Republic.....	September 9 and November 24, 1966.
Ceylon.....	November 21, 1962.
Chad.....	August 31, 1966.
Chile.....	October 3 and 4, 1962.
Costa Rica.....	November 21 and 23, 1962.
Cyprus.....	August 23, 1962.
Dahomey.....	June 30 and July 3, 1967.
Dominica.....	December 16, 1966 and January 11, 1967.
Dominican Republic.....	May 2, 1962.
Ecuador.....	August 3, 1962.
El Salvador.....	August 11 and November 13 and 20, 1967.
Ethiopia.....	May 23, 1962.
Fiji.....	June 25, 1968.
Gabon.....	October 4, 1962.
Gambia.....	November 26 and December 5, 1966.
Ghana.....	July 19, 1961.
Grenada.....	December 19, 1966 and December 16, 1967.
Guatemala.....	December 28 and 29, 1962.
Guinea.....	December 11 and 14, 1962.
Guyana.....	May 31 and June 7, 1967.
Honduras.....	July 16 and 20, 1962.
India.....	November 13 and 21, 1962.
Indonesia.....	March 8 and 14, 1963.
Iran.....	May 27, 1964.
Ivory Coast.....	April 5 and 21, 1962.
Jamaica.....	February 15 and 22, 1962.
Kenya.....	August 26, 1964.
Korea.....	September 14, 1966.
Lesotho.....	September 22, 1967.
Liberia.....	March 5 and 8, 1962.
Malawi.....	March 4 and April 20, 1965.
Malaysia.....	September 4, 1961.
Malta.....	April 29 and June 24, 1970.
Mauritania.....	September 19 and October 17, 1966.
Mauritius.....	March 18, 1971.
Montserrat.....	April 3 and May 16, 1968.
Morocco.....	February 8 and 9, 1963.
Nepal.....	August 24, 1962.
Nicaragua.....	May 23 and 25, 1968.
Niger.....	July 23, 1962.
North Borneo.....	October 25, 1962.
Pakistan.....	May 31, 1962.
Panama.....	October 30, 1963.

Country	Date Program Agreement Signed
Paraguay-----	November 4, 1966.
Peru-----	January 25, 1962.
Philippines-----	October 11 and 31, 1961.
St. Christopher Nevis and Anguilla-----	December 19, 1966 and January 10, 1967.
St. Lucia-----	October 19, 1965 and November 10, 1965.
St. Vincent-----	December 16, 1966 and January 18, 1967.
Sarawak-----	October 25, 1962.
Senegal-----	January 10 and 17, 1963.
Sierra Leone-----	December 29, 1961.
Somalia Republic-----	March 29 and April 17, 1962.
Swaziland-----	November 11, 1970.
Tanzania-----	July 17 and 21, 1961.
Thailand-----	November 20 and 28, 1961.
Togo-----	September 5, 1962.
Tonga-----	May 17 and 27, 1968.
Tunisia-----	February 7 and 13, 1962.
Turkey-----	August 27, 1962.
Uganda-----	November 16, 1964.
Upper Volta-----	(Presently being negotiated.)
Uruguay-----	July 31, 1963.
Venezuela-----	April 14 and May 28, 1962.
Western Samoa-----	October 1, 1970.
Zaire (the Congo)-----	October 12, 1970.

DEPARTMENT OF STATE,
AGENCY FOR INTERNATIONAL DEVELOPMENT
Washington, D.C., April 7, 1972.

HON. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of March 30, which, noting that Government agencies routinely enter into executive agreements with foreign states, requested a list of all executive agreements since World War II in which this Agency has participated, along with the purpose of and authority for the agreements.

The foreign assistance activities of the Agency for International Development (A.I.D.) and its predecessor agencies are undertaken pursuant to diplomatic-level agreements entered into on behalf of the United States by the Secretary of State or the Ambassadors or other diplomatic representatives to the aid-receiving countries. The purpose of these agreements, called basic bilateral agreements, is to establish the ground rules for the United States nonmilitary foreign aid program in the recipient countries.

I understand that the State Department has previously prepared a list of international agreements other than treaties covering the period from 1946 to 1968, and that it has, at your request, been brought up to date to April 1972. I am informed that they expect to deliver this material to your Subcommittee on or about April 7. The listing includes the basic bilateral agreements referred to above, with both an identification of each agreement and a statement of the authority under which it was executed on behalf of the United States.

Specific programs and projects for assistance are conducted by A.I.D. in accordance with working-level agreements normally executed by the Mission Director or other A.I.D. representative in the A.I.D. receiving country. These agreements, entered into pursuant to the basic bilateral agreement, are standardized in format. The attached copies of Project Agreement for Masai Livestock and Range Management in Tanzania (Project No. 621-11-093), Loan Agreement for the Pakistan Commodity Import Program for FY 1970 (Loan No. 391-H-148), and Loan Agreement for The Korea Institute of Science and Technology (Loan No. 489-H-054) are illustrative. There are many hundreds of such operational agreements and their compilation would be a monumental undertaking. We assume that they do not fall in the purview of your request.

I trust that this letter, its enclosures, and the list being prepared by the

State Department will provide your Subcommittee with the information desired from this Agency. Please let me know if I can be of any further assistance in this regard.

Sincerely yours,

MAURICE J. WILLIAMS
(For John A. Hannah).

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY,
Washington, D.C.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of March 30, 1972, in which you requested a list of all executive agreements since World War II in which this Department has participated along with the purpose of and authority for the agreements.

Enclosed is a list which has been prepared based on information which we have located in the files of the Department. It may be that there are other agreements, which were entered into since World War II, which could be located if there were more time to review the files, some of which are in dead storage. Based on advice from Mr. Edmisten of your staff, we have not included in the list any agreements in the negotiation of which this Department rendered assistance but which were signed by the President or representatives of other U.S. Government agencies.

If you wish further information as to any of the agreements on the enclosed list, please let us know.

Sincerely,

LIST OF EXECUTIVE AGREEMENTS WITH FOREIGN STATES, SINCE WORLD WAR II,
IN WHICH THE DEPARTMENT OF AGRICULTURE HAS PARTICIPATED

1. The Department (ARS-APHIS) entered into two cooperative agreements with foreign countries under the first section of the Act of February 28, 1947, as amended, 21 U.S.C. 114b, for the control and eradication of foot-and-mouth disease, rinderpest, screw-worm, and other communicable diseases of animals. These agreements are still in effect. One of the agreements was with the Government of Mexico, signed April 2, 1947, and was for the purpose of forming the Mexico-United States Commission for the Eradication of Foot-and-Mouth Disease and Rinderpest. It has been modified from time to time over the years but is still in effect with respect to the basic provisions. The other agreement was with the Government of Nicaragua, signed on March 24, 1972, by Nicaraguan officials and the United States Ambassador, who signed on behalf of the Department of Agriculture officials. The purpose of this agreement was to cooperate in the control and eradication of foot-and-mouth disease and rinderpest.

2. The Department entered into an agreement with Costa Rica under the Act of July 6, 1968, 21 U.S.C. 114d-2, for the purpose of the control and eradication of foot-and-mouth disease and rinderpest. This agreement is considered inoperative by the Department because of the repeal of the Act of July 6, 1968, by Public Law 92-152, approved November 5, 1971. Another agreement with Costa Rica, under authority of the first section of the Act of February 28, 1947, as amended, 21 U.S.C. 114b, has been signed by Agriculture officials but has not yet been signed by Costa Rica officials.

3. The Secretary of Agriculture, in January 1966, signed a multilateral agreement in behalf of the United States with Mexico, India, Spain, UAR, and the Sudan to provide for the establishment of the International Institute for Cotton for the purpose of carrying out cotton market development programs throughout the world. The UAR and the Sudan never ratified the agreement and did not become members. Uganda, Tanzania, Greece and Brazil have since joined the Institute. The agreement was signed pursuant to authority provided in section 104(b)(1) of the Agricultural Trade Development and Assistance Act of 1954, as amended (7 U.S.C. 1704(b)(1)), and section 601 of the Agricultural Act of 1954, as amended (7 U.S.C. 1761). Amounts needed to meet

U.S. obligations are provided with funds appropriated to the Department of Agriculture for market development activities abroad and with foreign currencies set aside for use under 7 U.S.C. 1704(b)(1) which are purchased with such appropriated funds.

4. The following executive agreements have been entered into between the Commodity Credit Corporation, a corporate agency of the United States, and the Cuban Sugar Stabilization Institute, an agency of the Cuban Government:

a. Purchase and Sale Contract for the 1946 and 1947 Cuban Sugar Crops, and molasses and alcohol, dated July 16, 1946. Purpose of the agreement was to obtain at fair prices adequate supplies of sugar, molasses and alcohol. Authority for the agreement was the Commodity Credit Corporation's charger.

b. Supplemental Agreement for the Purchase and Sale of Cuban Refined Sugar of the 1947 crop, dated August 6, 1947. Purpose of the agreement was to purchase at fair prices Cuban fine granulated refined sugar of the 1947 crop for consumption in the United States. Authority for the agreement was the Commodity Credit Corporation's charger.

c. Purchase Contract for 1948 Cuban Raw Sugar, dated March 19, 1948. Purpose of the purchase was to obtain sugar to meet the requirements of programs for the feeding of occupied areas or countries receiving or to receive United States aid. Authority for the agreement was the Commodity Credit Corporation's charger.

5. An estimated 50 agreements were signed on various dates from about 1950 through 1971 for the sale by Commodity Credit Corporation of nonfat dry milk, cheese, wheat and cottonseed oil to agencies of the Governments of Japan, Mexico, Italy, India, Brazil, and possibly other countries, for use in school lunch programs and welfare programs in such countries. The authority for these agreements appears in section 4 and 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b and 714c) and section 407 of the Agricultural Act of 1949 (7 U.S.C. 1427).

6. CCC made sales of wheat from its inventories for unrestricted use directly to the Government of the Union of South Africa pursuant to agreements signed in 1954, 1955, and 1958. It also made sales of wheat in 1954 to the Government of Spain for foreign currencies. The foreign currencies were purchased from CCC by other U.S. Government agencies. CCC possibly has had sales agreements with other foreign countries for the sale of agricultural commodities prior to these dates. Authority for these agreements is contained in sections 4 and 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b and 714c) and section 407 of the Agricultural Act of 1949 (7 U.S.C. 1427).

7. Agreement dated June 27, 1963, was entered into between the Secretary of Agriculture, for the Government of the United States, and Dr. B. K. Nehru, for the Government of India, relating to the barter and exchange of cotton and other agricultural commodities for various strategic and critical materials through commercial trade channels. The authority for this agreement appears in sections 4 and 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b and 714c). There apparently were about three other such agreements with the Government of India made in the late 1950's, but the information on such agreements is contained in files which are in the Archives.

8. An agreement and Protocol dated October 11, 1967, was entered into between Commodity Credit Corporation and the Governments of Kuwait, Qatar, and Lebanon providing for the settlement of claims by such parties against Intra Bank, S.A.L., Beirut, Lebanon, and the reorganization of such bank and creation of a commercial investment company to take over the non-banking assets of Intra Bank. Intra Bank, the largest commercial bank in Lebanon, had been closed by the Lebanese Government because it was unable to pay the demands of depositors in due course. The authority for the execution of such agreement and protocol by the Commodity Credit Corporation appears in section 4 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b).

9. An agreement dated December 20, 1971, was entered into between Commodity Credit Corporation and the Government of the Arab Republic of Egypt regarding the consolidation and rescheduling of a past due debt owed to Commodity Credit Corporation by the Bank of Egypt under the Export Credit Sales Program and to arrange for new credits under that program. The authority for this agreement appears in section 4 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b) and section 4 of the Food for Peace Act of 1966 (7 U.S.C. 1707a).

10. A Cooperative Agreement was entered into between the Province of British Columbia, acting through its Department of Lands and Forestry, and the Soil Conservation Service of the U.S. Department of Agriculture on October 1, 1958. The agreement was amended August 9, 1960. The original agreement is for the purpose of "coordination of surveys and reports for Columbia Basin now survey network in British Columbia and the United States." The amendment adds "that portion of the Yukon River Basin located in British Columbia." The authority for this Cooperative Agreement is the Soil Conservation Act of April 27, 1935, 49 Stat. 163, U.S.C. 590a -f; the Act of October 1, 1890, Ch. 1266, 26 Stat. 653; and Reorganization Plan No. IV, effective June 30, 1940, 5 U.S.C. 133t (1964 edition), section 8.

11. This Department entered into an agreement with the Government of Iran in October 1969 to furnish a technical consultant on a reimbursable basis to provide advice on problems of crop insurance. The agreement was signed under the authority of section 607 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2357).

U.S. ATOMIC ENERGY COMMISSION,
Washington, D.C., April 6, 1972

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate.

DEAR SENATOR ERVIN: This is in response to your letter of March 30, 1972, requesting information about executive agreements for the forthcoming hearings of the Subcommittee. Executive Agreements in which the Atomic Energy Commission participates are included in the State Department's "Treaties and Other International Acts Series" (TIAS). A list is enclosed and, as you will see, it covers the following groups:

- (a) Agreements for Cooperation in the civil uses of atomic energy;
- (b) Safeguards agreements, primarily trilateral agreements among the United States Government, the International Atomic Energy Agency (IAEA) and another country for the IAEA to assume responsibility for the application of safeguards against diversion to military use of items transferred under the civil Agreement for Cooperation with that country;
- (c) Agreements for mutual defense purposes;
- (d) Agreements covering grants under the "Atoms for Peace" program for research and training equipment and material, and also several special purpose agreements (uranium reconnaissance, air sampling and visit by the N.S. "Savannah" to foreign waters and ports).

As a part of broader scientific and cultural agreements with the USSR and Romania, the Commission has participated in Memoranda on Cooperation provided for in the overall Exchanges Agreements between the Governments (TIAS 4362, 5582, 6570 and 6878 and TIAS 6604 and 7023, respectively). Such memoranda were concluded with the USSR in November 1959, May 1963, July 1968 and February 1970 and with Romania in November 1968 and September 1971. Also under the Exchanges Agreement a desalination agreement was concluded between the U.S. and the USSR in November 1964 and was renewed in 1966 for a further two-year period.

We would be pleased to provide such further information as you may desire.

Sincerely,

R. E. HOLLINGSWORTH, *General Manager.*

USAEC PARTICIPATION—U.S. EXECUTIVE AGREEMENTS

I. AGREEMENTS FOR COOPERATION IN THE CIVIL USES OF ATOMIC ENERGY (AS HAVE BEEN AMENDED OR SUPERSEDED)

Purpose.—establish basis for cooperative activities, permit the export of certain equipment and of special nuclear material, and provide for safeguards to ensure the peaceful uses of such exported items.

Authority.—Atomic Energy Act of 1954, as amended.

A. Research level applications, including fueling of research reactors:

Argentina (TIAS 3299, 4527.

Austria (TIAS 3600, 4402, 6136).

Brazil (TIAS 3303, 4255, 4539, 5110, 5676, 6126).

Chile (TIAS 3306).
 China, Rep. of (TIAS 3307, 4107, 4176, 4514, 5105, 5623, 6099).
 Colombia (TIAS 3308, 5330, 6043).
 Costa Rica (TIAS 4682).
 Cuba (TIAS 3911).
 Denmark (TIAS 3309, 3758, 4393, 6538).
 Dominican Republic (TIAS 3711).
 Ecuador (TIAS 3983).
 Germany, Fedl. Rep. (TIAS 3543, 3765).
 Germany, Fedl. Rep. (TIAS 3543, 3765). F.R.G. on behalf of W. Berlin (TIAS 3874, 5109).
 Greece (TIAS 3310, 4837, 5250, 5251, 6478, 6853).
 Guatemala (TIAS 3802).
 Indonesia (TIAS 4557, 6124, 7001).
 Iran (TIAS 4207, 6219, 6726).
 Ireland (TIAS 4059, 4690, 5511, 6532).
 Israel (TIAS 3311, 4407, 4507, 5079, 5723, 5909, 6091).
 Italy (TIAS 3312).
 Japan (TIAS 3465).
 Korea (TIAS 3490, 4030, 5957).
 Lebanon (TIAS 3313).
 Netherlands (TIAS 3461).
 New Zealand (TIAS 3626, 4526).
 Nicaragua (TIAS 3998).
 Pakistan (TIAS 3315).
 Panama (TIAS 5370).
 Peru (TIAS 3483).
 Philippines (TIAS 3316, 4515, 5677, 6119).
 Portugal (TIAS 3317, 3899, 4519, 5111, 5679, 6717).
 Spain (TIAS 3318).
 Sweden (TIAS 3477, 3775, 4035, 5143).
 Switzerland (TIAS 3319).
 Thailand (TIAS 3522, 3842, 4533, 5122, 5765).

Note: The italicized TIAS numbers represent agreements in effect.

Turkey (TIAS 3320, 4748, 5828, 6040, 7122).
 United Kingdom (TIAS 3321, 3359, 3608, 5397, 5693, 5829, 6050, 6966).
 Uruguay (TIAS 3476).
 Venezuela (TIAS 3323).
 Viet Nam (TIAS 4251, 5622).

B. Research and power applications, including fueling of research and power reactors:

Argentina (TIAS 5125, 5660, 6721).
 Australia (TIAS 3830, 4687, 6250).
 Austria (TIAS 6815).
 Belgium (TIAS 3301, 3738, 4317, 5454).
 Canada (TIAS 3304, 3771, 4518, 5102).
 Finland (TIAS 6896).
 France (TIAS 3689, 3883, 4319, 4694, 5128, 5644).
 Germany, Fed. Rep. (TIAS 3877, 4314, 5120).
 Italy (TIAS 4016, 4689).
 Japan (TIAS 4133, 4172, 5553, 6517).
 Netherlands (TIAS 3876, 4339).
 Norway (TIAS 3836, 6260, 6849).
 Philippines (TIAS 6522).
 South Africa (TIAS 3885, 5129, 6312).
 Spain (TIAS 3988, 5990).
 Sweden (TIAS 6076, 7000).
 Switzerland (TIAS 3745, 4236, 4618, 6059).
 Venezuela (TIAS 4416, 6945).

C. Power applications, including fueling power reactors:

India (TIAS 5446).
 United Kingdom (TIAS 6046).

D. Civil uses Agreements for Cooperation with international organizations.
 1. Euratom—Agreement for cooperation intent (TIAS 4091); joint program for research and development, including fueling of power-producing reactors (TIAS 4173, 5103); additional Agreement for use of special nuclear material—power reactor and fuel reprocessing facilities. (TIAS 4650, 5104, 5444)

Authority: In addition to the 1954 Atomic Energy Act, the EURATOM Cooperation Act of 1958.

2. International Atomic Energy Agency—Agreement providing for the U.S. making special nuclear material and equipment available to the Agency—an enabling agreement in support of the varied program of the IAEA in the peaceful uses of atomic energy. (TIAS 4291)

Authority: In addition to the 1954 Atomic Energy Act, the IAEA Participation Act of 1957 and the Statute of the IAEA.

II. SAFEGUARDS

A. Trilateral safeguards transfer agreements among the U.S., a "civil uses" agreement country, and the International Atomic Energy Agency.

Purpose.—Provides for the application of IAEA safeguards to materials and equipment transferred from the U.S. under the civil uses Agreement for Cooperation.

Authority.—Atomic Energy Act of 1954, as amended, and IAEA Statute.

Argentina (TIAS 6004, 6722).

Australia (TIAS 6117).

Austria (TIAS 5914, 6816).

Brazil (TIAS 6583).

China, Rep. of (TIAS 5882, 7228).

Colombia (TIAS 7010).

Denmark (TIAS 6459).

Greece (TIAS 5952).

India (TIAS 7049).

Indonesia (TIAS 6391).

Iran (TIAS 6390, 6741).

Israel (TIAS 6027).

Japan (TIAS 5429, 6388, 6520).

Korea (TIAS 6435).

Philippines (TIAS 5879, 6524).

Portugal (TIAS 5915, 6718).

South Africa (TIAS 5880, 6306).

Spain (TIAS 6182).

Sweden (not yet printed).

Switzerland (not yet printed).

Thailand (TIAS 5861).

Turkey (TIAS 6692).

Venezuela (TIAS 6433).

Viet Nam (TIAS 5884).

B. Special safeguards agreements with:

1. Canada (TIAS 6649).

Purpose.—provides for the U.S. guarantee of the peaceful use of certain small quantities of Canadian natural uranium while they are in the U.S.

Authority.—Atomic Energy Act of 1954, as amended.

2. International Atomic Energy Agency (TIAS 5002, 5621, 6769, 6826).

Purpose.—provides for the application of safeguards by the IAEA to 4 U.S. reactors, basically to provide an opportunity for the Agency to gain "field" experience in the development and application of its safeguards system.

Authority.—Atomic Energy Act of 1954, as amended, and Statute of the IAEA.

III. MUTUAL DEFENSE AGREEMENTS

Purpose.—provide for the communication of classified information on the use and effects of atomic weapons and provision of non-nuclear parts of weapons systems.

Authority.—Atomic Energy Act of 1954, as amended.

Australia (TIAS 3881—information only).

Belgium (TIAS 5157).

Canada (TIAS 3305—information only).

France (TIAS 4867).

Germany, Fed. Rep. (TIAS 4276).

Greece (TIAS 4292).

Italy (TIAS 4764).

Netherlands (TIAS 4277).

Turkey (TIAS 4278).

United Kingdom (TIAS 3322—information only).

NATO (TIAS 3521, 5768—information only).

Others having additional coverage:

Canada (TIAS 4271—includes provision of submarine technology).

France (TIAS 4268—includes provision of submarine fuel material).

United Kingdom (TIAS 4078, 4267, 6659, 6861—amended agreement providing for transfer of submarine technology, submarine reactors and fuel, weapons manufacture technology, and nuclear material and parts for weapons).

IV. OTHERS

A. "Atoms for Peace" grants for research and training equipment and materials.

Purpose.—Establish the basic terms governing provision of financial grants for the purchase of various materials and equipment needed by universities and hospitals in such disciplines as medicine, agriculture, and physics.

Authority.—Atomic Energy Act of 1954, as amended, and Section 419 of the Mutual Security Act of 1954.

Argentina (TIAS 4508, 5504).

Brazil (TIAS 4547, 4727, 5337).

China (TIAS 4457).

China, Rep. of (TIAS 4371).

Colombia (TIAS 4421).

Guatemala (TIAS 4485).

India (TIAS 4505, 5288).

Ireland (TIAS 4453).

Israel (TIAS 4655).

Korea (TIAS 4617).

Lebanon (TIAS 4343).

New Zealand (TIAS 4445).

Peru (TIAS 4304).

Yugoslavia (TIAS 4731).

B. N.S. "Savannah".

Purpose.—Establish understandings regarding the operation of the N.S. Savannah".

Authority.—Atomic Energy Act of 1954, as amended, and Safety of Life at Sea Convention.

Belgium (TIAS 5466).

China, Rep. of (TIAS 6303).

Denmark (TIAS 5612).

Germany, Fed. Rep. (TIAS 5223).

Greece (TIAS 5099, 6216).

Ireland (TIAS 5651).

Italy (TIAS 5699, 5938).

Netherlands (TIAS 5357, 5358, 5892).

Norway (TIAS 5576).

Portugal (TIAS 5740).

Spain (TIAS 5626).

Sweden (TIAS 5613).

United Kingdom (TIAS 5633, 6288).

Yugoslavia (TIAS 6326).

C. Australia-U.S. cooperative study of the radioactivity of the upper atmosphere by balloons. (TIAS 4739, 5231, 6017, 6078, 6092, 6680).

Authority.—Atomic Energy Act of 1954, as amended.

D. Cooperative programs on uranium reconnaissance with a view to developing sources available to the U.S.:

Authority.—Atomic Energy Act of 1954, as amended.

Brazil (TIAS 3385, 3872, 3964, 4537).

Chile (TIAS 3912, 4396).

E. Mexico-IAEA-U.S. desalting agreement (TIAS 5874).

Purpose.—Provided for joint study group to make a preliminary assessment of the technical and economic practicability of a dual-purpose reactor (produce fresh water and electricity) in border areas.

Authority.—Atomic Energy Act of 1954, as amended.

CANAL ZONE GOVERNMENT,
Balboa Heights, Canal Zone, April 3, 1972.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: In response to your request there is enclosed a list of Executive Agreements entered into since World War II with a foreign State (Panama) in which the Panama Canal Company or Canal Zone Government has participated.

Sincerely yours,

DAVID S. PARKER, *Governor.*

CANAL ZONE GOVERNMENT

I. Agreement providing for the reciprocal recognition of motor-vehicle license plates in Panama and the Canal Zone, effected by Exchange of Notes signed December 7 and December 12, 1950, (Canal Zone Code, Vol. 3, App. IX, pp. 557-61)

The purpose of this agreement was to require residents of the Isthmus of Panama to obtain motor vehicle licenses and license tags from the authorities of only the Canal Zone or the Republic of Panama, but not both.

The authority for this agreement was Canal Zone Code, 1934, title 2, section 322 (now 2 C.Z.C. § 1002, 76A Stat. 37) and Executive Order 9746 of July 1, 1946, as amended by Executive Order 10595 of February 7, 1955 (now Executive Order 11305 of September 12, 1966, codified at 35 CFR 3.3).

II. Agreement establishing procedures for the reciprocal recognition of motor-vehicle operator's licenses by the Canal Zone and Panama, effected by Exchange of Notes signed at Panama October 31, 1960. (Canal Zone Code, Vol. 3, App. IX, pp. 596-601)

The purpose of this agreement was to prescribe procedures for reciprocal recognition of motor vehicle operator's licenses issued by the two jurisdictions on the Isthmus of Panama, and thereby to establish comity for the convenience of the residents of those jurisdictions.

The authority for this agreement is the same as that for the License plate agreement of 1950.

PANAMA CANAL COMPANY

I. Agreement for the furnishing of water by the Panama Canal Company to the Republic of Panama, and for other purposes, signed at Panama September 30, 1954. (Canal Zone Code, Vol. 3, App. IX, 1970 cum. pocket supplement, pp. 32-5)

The primary purpose of this agreement was to provide that the Panama Canal Company would furnish the Government of Panama with water for the cities of Panama and Colon under certain terms and conditions for a period of two years, subject to extension by mutual agreement.

The authority for this agreement is derived from Point One ("The Waterworks at Colon and Panama") of the Agreement between the United States of America and Panama respecting general relations, effected by Exchange of Notes signed at Washington on May 18, 1942. (Canal Zone Code, Vol. 3, App. IX, pp. 546-56)

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C. April 7, 1972.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: In response to your letter of March 30, 1972 inquiring about executive agreements with foreign states in which this Agency has

participated, this is to advise you that all such agreements are included in the State Department list of executive agreements concluded from 1966 to April of this year which I understand is being provided to you by the State Department.

Sincerely,

RICHARD HELMS. *Director.*

CIVIL AERONAUTICS BOARD,
Washington, D.C., April 6, 1972.

Hon. SAM J. ERVIN, JR.,

Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of March 30, 1972, in which you request the submission of a list of all executive agreements in which the Civil Aeronautics Board has participated since World War II.

Under Section 801 of the Federal Aviation Act of 1958, the Civil Aeronautics Board advises and consults with the Department of State concerning the negotiation of agreements for the exchange of air transport rights. The Board does not conclude such agreements in its own right.

Enclosed is a list of air transport agreements in which negotiation the Board participated. The purpose of this system of agreements is to regularize through bilateral inter-governmental agreement commercial air operations to and from the United States.

I hope this information is responsive to your request. The Board is prepared to provide any further assistance desired by the Subcommittee.

Sincerely,

SAM D. BROWN, *Chairman.*

CIVIL AERONAUTICS BOARD LIST OF EXECUTIVE AGREEMENTS IN WHICH CAB HAS PARTICIPATED SINCE 1945

Bilateral civil aviation agreements		
Country	Date of agreement	Amendments
Australia.....	Dec. 3, 1946.....	Mar. 10, 1947 Aug. 12, 1957 Nov. 20, 1959
Austria.....	June 23, 1966 (Replaced interim agreement of Oct. 8, 1947.).....	
Belgium.....	Apr. 15, 1947 (Replaced interim agreement of Feb. 1, 1946.).....	
Bolivia.....	Sept. 29, 1948.....	May 17, 1967
Brazil.....	Sept. 6, 1946.....	Dec. 10, 1950 Dec. 1, 1958 Dec. 13, 1968
Burma.....	Sept. 28, 1949.....	
Canada.....	Jan. 17, 1966 (Replaces agreement of June 4, 1949.).....	
Chile.....	May 10, 1947.....	
China.....	Dec. 20, 1946.....	Dec. 19, 1950 Apr. 15, 1955 Oct. 22, 1969 Oct. 1968
Colombia.....	Oct. 24, 1956.....	July 30, 1957
Cuba.....	May 26, 1953.....	
Czechoslovakia.....	Feb. 29, 1969 (Replaces agreement of Jan. 3, 1946.).....	
Denmark.....	Dec. 16, 1949.....	Mar. 21, 1946 Aug. 6, 1954 July 8, 1958 June 7, 1966 Oct. 19, 1971
Dominican Republic.....	July 19, 1949.....	Jan. 10, 1951
Ecuador.....	Jan. 8, 1947.....	
Finland.....	Mar. 29, 1949.....	
France.....	Mar. 27, 1946 (Replaced agreement of July 15, 1938.).....	July 11, 1950 Mar. 19, 1951 Aug. 27, 1959 Apr. 15, 1960 May 29, 1969 Apr. 5, 1968 Feb. 7, 1966 Dec. 20, 1968
Germany.....	July 7, 1955.....	
Greece.....	Mar. 27, 1946.....	
Iceland.....	Jan. 27, 1945.....	
India.....	Feb. 3, 1956.....	
Indonesia.....	Jan. 13, 1968.....	
Iran.....	Jan. 16, 1957 (One year's notice of termination given on Aug. 19, 1970.).....	
Ireland.....	Feb. 3, 1945.....	June 3, 1947 Mar. 4, 1958
Israel.....	June 13, 1950.....	Feb. 21, 1951

CIVIL AERONAUTICS BOARD LIST OF EXECUTIVE AGREEMENTS IN WHICH CAB HAS PARTICIPATED SINCE 1945

Bilateral civil aviation agreements		
Country	Date of agreement	Amendment,
Italy	June 9, 1947 Feb. 6, 1948 (Terminated May 31, 1967.)	Mar. 24, 1950 Aug. 4, 1958
Jamaica	June 22, 1970	
Japan	Oct. 2, 1969 Aug. 11, 1952	Sept. 15, 1952 Jan. 14, 1959 Dec. 22, 1965 Nov. 12, 1969 Mar. 26, 1971
Korea	Apr. 24, 1957 (Replaced provisional agreement of June 29, 1949.)	
Lebanon	Aug. 11, 1946	
Mexico	Aug. 15, 1960 (Replaced agreement of Mar. 7, 1957.)	Aug. 14, 1963 Aug. 14, 1964 Aug. 4, 1965 Sept. 19, 1967 July 31, 1970
Malaysia	Feb. 2, 1970	
Morocco	Feb. 9, 1970	
Netherlands	Apr. 3, 1957	Nov. 25, 1969
New Zealand	June 24, 1964 (Replaced agreement of Dec. 3, 1946.)	
Norway	Oct. 6, 1945	Aug. 6, 1954 July 8, 1958 June 7, 1966 Apr. 18, 1961 June 3, 1952 June 6, 1967
Pakistan	June 16, 1948	
Panama	Mar. 31, 1949	
Paraguay	Feb. 28, 1947	
Peru	Dec. 27, 1946	Apr. 24, 1958 May 28, 1958 Mar. 2, 1966
Philippines	Nov. 16, 1946 (Terminated by Philippines Mar. 3, 1960.) May 12, 1947 (Expired Mar. 27, 1956.) Mar. 16, 1950 (Expired Mar. 15, 1955.)	
Portugal	Dec. 6, 1945	June 28, 1947 Nov. 11, 1952 May 30, 1970 Nov. 2, 1953 June 28, 1968
Rep. of South Africa	May 23, 1947	Jan. 15, 1946 Mar. 12, 1946 July 4, 1950 July 21, 1954 Dec. 4, 1945 Aug. 6, 1954 July 8, 1958 June 7, 1966 May 13, 1949 Dec. 9, 1970 May 5, 1957 Mar. 3, 1970
Spain	Dec. 2, 1944	
Sweden	Dec. 19, 1944	
Switzerland	Aug. 3, 1945	
Syrian Arab Republic	Apr. 28, 1947	
Thailand	Feb. 26, 1947 (Siam)	
Turkey	Feb. 12, 1946	
U.S.S.R.	Nov. 4, 1966	May 6, 1968 Mar. 17, 1972
United Arab Republic	May 5, 1964 (Replaced agreement of June 15, 1946.)	
United Kingdom	Feb. 11, 1946	Jan. 27, 1947 May 23, 1947 Jan. 14, 1948 Aug. 16, 1955 Oct. 30, 1956 Dec. 28, 1956 Nov. 22, 1961 May 27, 1966
Uruguay	Dec. 14, 1946 (Provisional pending ratification.)	
Venezuela	Aug. 14, 1953	Dec. 30, 1954 Feb. 11, 1972
Yugoslavia	Dec. 24, 1949 (Terminated by Yugoslavia Aug. 3, 1959.)	
Zaire	Aug. 14, 1970 (Formerly Congo "Kinshasa").	

In addition to the agreements listed above, the State Department has determined that between the United States and certain newly-independent nations there are in force the provisions of pre-independence bilateral agreements between the United States and the countries of which the new nations were a part. These nations are listed below along with the country from which they gained independence and the date of their independence.

Botswana (U.K., September 30, 1966).

Ceylon (U.K., February 4, 1948).
 Congo (B) (France, August 15, 1960).
 Cyprus (U.K., August 16, 1960).
 Gambia (U.K., February 18, 1965).
 Ghana (U.K., March 6, 1957).
 Guyana (U.K., May 26, 1966).
 Malagasy Republic (France, June 26, 1960).
 Malta (U.K., September 21, 1964).
 Mauritius (U.K., March 12, 1968).
 Nigeria (U.K., October 1, 1960).
 Sierra Leone (U.K., April 27, 1961).
 Swaziland (U.K., September 6, 1968).
 Trinidad & Tobago (U.K., August 31, 1962).
 Zambia (U.K., October 24, 1964).

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., April 20, 1972.

HON. SAM J. ERVIN, JR.

*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,
 U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Secretary Peterson has asked me to reply to your recent letter requesting information concerning all Executive Agreements in which this Department has participated since World War II.

At the outset I should note that the records associated with organizations transferred out of the Department since World War II (e.g., the former Civil Aeronautics Administration of this Department which is now the Federal Aviation Administration in the Department of Transportation) were transferred with those organizations and are not covered herein.

I. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

A. FISHERIES AGREEMENTS

These Executive Agreements were signed by the Department of State and although NOAA (or its predecessor agencies) participated in them, the statutory authority could best be supplied by the Department of State:

1. *Agreement with the U.S.S.R. on the Middle Atlantic Fishery*, December 13, 1968, 19 UST, 7661, TIAS 6603 (renegotiated December 1970) (2 years). Termination—December 1972. Member countries are U.S.S.R. and United States. Areas of geographical interest—Middle Atlantic area and waters of the 50 to 100 fathoms zone from Rhode Island to Virginia and a small area within the U.S. contiguous zone off New Jersey and Long Island. Species concerned—Groundfish and other species with emphasis on river herring, scup, flounder, red hake, silver hake, black sea bass and menhaden.

2. *Traditional Fisheries Agreement with Mexico*, October 27, 1967, 18 UST 2724; TIAS 6359 (effective January 1, 1968) (5 year agreement). Termination—October 1972. Member countries are: Mexico and United States. Areas of geographical interest—Waters between 9 and 12 miles off the coast of the United States and Mexico. Species concerned—Stocks of mutual concern, particularly shrimp and tuna.

3. *Agreement with Japan on the King and Tanner Crab Fisheries of the Eastern Bering Sea*, November 25, 1964, 15 UST 2076, TIAS 5688 (effective November 25, 1964); modified and extended November 1970 (2 years). Termination—November 1972. Member countries are: Japan and United States. Areas of geographical interest—Western continental shelf of the United States. Species concerned—King and Tanner Crabs.

4. *Agreement with Japan on the Contiguous Fishery Zone*, May 9, 1967, 18 UST 1309, TIAS 6287, modified and extended, November 1970 (2 years). Termination—November 1972. Member countries are: Japan and United States. Areas of geographical interest—Northeast Pacific, Eastern Bering Sea, Gulf of Alaska and the U.S. contiguous zone off Alaska and the State of Washington. Species concerned—Species of mutual concern with emphasis on halibut, Pacific Ocean perch and black cod.

5. *Agreement with U.S.S.R. on Fishing Operations in the Northeastern Pacific (Gear Conflict)*, December 14, 1964, 15 UST 2179, TIAS 5703 (effective

December 14, 1964), renegotiated February 1971 (2 years). Termination—January 1973. Member countries are: U.S.S.R. and United States. Areas of geographical interest—Gulf of Alaska beyond the 12 mile fishery zone. Species concerned—King crab (Soviets agreed not to fish around Kodiak Islands for specified periods when U.S. king crab fishermen fish extensively with fixed crab gear).

6. *Agreement with the U.S.S.R. on the King and Tanner Crab Fisheries of the Eastern Bering Sea*, February 5, 1965, 16 UST 24; TIAS 5752 (effective February 5, 1965), renegotiated and extended February 1971 (2 years). Termination—January 1973. Member countries are: U.S.S.R. and United States. Areas of geographical interest—U.S. continental shelf in the Eastern Bering Sea. Species concerned—King and Tanner crabs.

7. *Agreement with the U.S.S.R. on the Contiguous Fishery Zone*, February 13, 1967, 18 UST 190; TIAS 6218, renegotiated and extended February 1971 (2 years). Termination—January 1973. Member countries are: U.S.S.R. and United States. Areas of geographical interest—Northeast Pacific including the U.S. contiguous zone. Species concerned—Species of mutual concern, particularly interest in halibut, King crab, salmon and rockfish.

8. *Agreement with Poland Regarding Fisheries in the Western Region of the Middle Atlantic Ocean*, June 12, 1969, modified and extended June 1970 (15 months). Termination—June 1972. Member countries are: Poland and United States. Areas of geographical interest—Western region of the Middle Atlantic Ocean and 3 areas within the U.S. contiguous zone off Long Island, New Jersey and Virginia. Species concerned—Groundfish species with emphasis on scup, flounder, red hake, silver hake, menhaden, river herring and black sea bass.

9. *Agreement with Canada concerning Reciprocal Fisheries Privileges*, April 24, 1970, see 52 Department of State Bull. 640 (1970). (2 years). Termination—April 1972. Member countries are: Canada and United States. Areas of geographical interest—The fishery contiguous zone extending along east and west coast of both nations, south of 63°N. Species concerned—Species of mutual concern with emphasis on Pacific salmon. Fishing for any species of clams, lobsters, scallops and shrimp in the reciprocal fishing area of either country is excluded.

B. COOPERATIVE WEATHER PROGRAMS

Pursuant to Executive Agreements established by an exchange of diplomatic notes between a U.S. Ambassador or State Department official and a comparable official of the foreign country concerned, the U.S. is currently participating in cooperative weather programs with:

Barbados	Jamaica
Brazil	Mexico
Chile	Netherlands Antilles
Colombia	Peru
Ecuador	Trinidad
French Antilles	United Kingdom
Israel	(Cayman Islands)

(Negotiations are currently in progress with Bahamas and Honduras. A program formerly in effect with Cuba lapsed following the rupture of diplomatic relations.)

Each Executive Agreement follows the same general pattern. After briefly describing the project and recording the intention of the two governments to institute the cooperative weather program, it records agreements at the inter-governmental level upon such administrative matters as title to equipment supplied, liability of participants, exemption from duties and taxes granted by the other Government, etc. It also specifies, for each country, which of its agencies will act as the designated cooperating agency of that country, responsible for implementing the country's portion of the joint program. NOAA is designated as the U.S. cooperating agency and the designated cooperating agency of the other country is usually its national weather service.

The Executive Agreement also directs the two designated cooperating agencies to draw up a Memorandum of Agreement specifying the further details of the cooperative program. These include an indication of the specific technical tasks assigned to each agency under the program.

The text of the Memorandum of Arrangement is usually worked out by correspondence between the two agencies or through the good offices of the Ameri-

can Embassy in the country concerned. It is normally signed by the Administrator of NOAA as head of the designated U.S. cooperating agency. On occasion, however, the American Ambassador may be asked to sign on behalf of NOAA.

The Memorandum of Arrangement is regarded as a separate *interagency* agreement, within the ambit of, and deriving from, the Executive Agreement concerned. However, in two cases, for special reasons, it was treated as an annex to the Executive Agreement and in those cases the text is reproduced, with the agreement, in the State Department's TIAS series.

Since these programs stem from Executive Agreements negotiated by the Department of State, the statutory authority therefor could best be supplied by that Department.

II. BUREAU OF INTERNATIONAL COMMERCE

Agreement between the Government of the United States of America and the Government of the Republic of the Philippines concerning matters of customs administration. January 4, 1967.

To provide the Philippine Government with information from Shipper's Export Declarations to enable that Government to combat smuggling; and, to provide for the removal of certain Philippine requirements with respect to documentation for U.S. importers.

Authorized by the Foreign Trade Statistics Act, 13 U.S.C. § 302 and regulations thereunder (15 C.F.R. 3091 (e)), and by the Export Control Act of 1949, 63 Stat. 7 (1949).

(In addition the Department has participated in all trade agreements negotiated under the trade agreements legislation, the U.S.-Canadian Auto Agreement and the cotton textile agreements. We are informed that all of these agreements are included in the submissions of either the Department of State or Special Assistant for Trade Negotiations. Accordingly, they are not listed herein).

III. MARITIME ADMINISTRATION

1. Memorandum of Understanding between the Maritime Administration and the Merchant Marine Commission of Brazil, dated June 15, 1967. The purpose of the memorandum was to express the understanding that Decree 60739, dated May 23, 1967, would give to United States flag ships so long as effective, the right to carry between Brazil and the United States up to 50 percent of all Brazilian government favored cargo and that the Maritime Administration would in return permit Brazilian flag vessels to carry to Brazil up to 50 percent of the cargo that is subject to Public Resolution 17, 73rd Congress (15 U.S.C. 616a). The authority to enter into the agreement is Public Resolution 17. This Resolution resolves that it is the sense of the Congress that in any loans made by an instrumentality of the Government to foster the exportation of agricultural or other products, provision shall be made that such products shall be carried exclusively in vessels of the United States. The Resolution has been interpreted by the Attorney General as not mandatory but as laying down a rule of guidance to be followed to the extent feasible and that the Secretary of Commerce should be consulted by the lending agency with regard to feasibility (37 Op. Atty. Gen. 546; 42 Op. No. 20). Since 1934, the Maritime Administration and its predecessors has permitted the borrowing nation's vessels to carry 50 percent of the cargo covered by the Resolution if that nation did not discriminate against American flag vessels.

2. Record of Meeting held on October 10, 1966, between representatives of the Venezuelan shipping agency on the one side and representatives of the United States State Department and the Maritime Administration on the other. The purpose of Record of Meeting was to record the understanding that the Venezuelan shipping agency would make up to 50 percent of the cargo subject to Venezuelan Resolution 331 available to United States flag ships and that the United States Maritime Administration would make up to 50 percent of the cargo subject to Public Resolution 17, 73rd Congress, available to Venezuelan flag ships. The authority is Public Resolution 17, 73rd Congress.

3. Memorandum of Consultation between representatives of the Brazilian shipping agency and the Ministry of External Relations on the one hand, and representatives of the United States Department of State and the Maritime Administration on the other, dated March 7, 1970. The purpose of the Memo-

random was to record an understanding that the Brazilian and United States Governments would subsequently negotiate an agreement providing equal access by Brazilian flag vessels and United States flag vessels to government controlled cargoes in the Brazilian/United States trades and that private pooling agreements would be executed between United States carriers and Brazilian carriers serving the trade. The authority is Public Resolution 17, 73rd Congress and section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. 1241(b)).

4. Protocol of the Soviet-American Negotiations on Commercial Shipping, dated December 2, 1971, signed by representatives of the Secretary of Commerce of the United States and of the Minister of Merchant Marine of the USSR. The purpose of the protocol was to express the agreement of the Parties to negotiate an agreement with respect to equal access to Government controlled cargo, reciprocal access to ports, and related shipping matters, as practicable. The authority is 50 U.S.C. 191, Public Resolution 17, 73rd Congress, and section 901(b) of the Merchant Marine Act, 1936.

IV. CENSUS BUREAU

The Census Bureau has entered into a large number of agreements with foreign government agencies to provide technical assistance for specific projects on a reimbursable basis. Since records for past years are not readily available (and may have been destroyed) and these arrangements are essentially contracts, they are not listed. However, a copy of one such arrangement is enclosed for your information.

V. PATENT OFFICE

1. The Patent Office under authority of 35 USC 12 has entered into agreements with 47 countries to exchange copies of U.S. patents issued and the Official Gazette for those of the other party. The purpose is to complete and keep up-to-date the search files to assure a more complete and comprehensive search of the prior art with respect to patent applications. Since these are essentially contractual they are not listed.

2. Under subsections (a) and (b) of section 6, title 35, United States Code, the Commissioner has the authority to carry on programs and studies cooperatively with foreign patent offices. This has been done in the form of exchanges of search results with foreign patent offices in corresponding applications for patent. These exchanges, which are made to aid the examiners in their examination of applications for patent, were either on a trial basis and have not been continued, or are in force at the present time on a continuing basis. Trial exchange programs were conducted with the patent offices of Austria, Czechoslovakia, Japan and Switzerland. Continuing programs are carried on with the patent offices of France, Germany (Federal Republic), the Philippines and Sweden.

3. Another arrangement under section 6, title 35, involves a committee for the international cooperation and information retrieval among patent offices, known by its acronym, ICIREPAT. This effort was initiated in 1961 as an informal ad hoc committee of patent offices in order to study mechanized documentation and retrieval systems with a view toward making recommendations for standardization, shared use, etc. In 1968, this informal ad hoc committee was transformed into a committee of experts under the Paris Convention for the Protection of Industrial Property. At this time, 20 patent offices, including the U.S. Patent Office, participate in ICIREPAT. Of course, the countries in which those patent offices are located must be members of the Paris Convention.

VI. NATIONAL BUREAU OF STANDARDS

1. Cooperation with Centre Scientifique et Technique du Batiment (France) on program of building research. To promote, through interchange of information and other means, technological and economic improvement of building. 15 USC 271 et seq.

2. Sister-relationship with Korean National Industrial Research Institute. To promote cooperation in areas of standards, meteorology and quality control (including training on a reimbursable basis) 15 USC 271 et seq.

I hope that this information will be helpful to your Committee.

Sincerely,

WILLIAM N. LETSON, *General Counsel.*

1. OFFICIAL COST ESTIMATE AND ACCEPTANCE

(REIMBURSABLE WORK OR SERVICES) 2. Appropriation code, 108.

3. Project No. 9442.

4. Sponsoring Division—I.S.P. Code———

5. Requested by—For internal use only:

Government of Greece
Ministry of Coordination
Athens, Greece

6. Conditions of acceptance.—In response to your inquiry, there is described in item 7 certain work and the estimated cost thereof. The Bureau of the Census is willing to undertake this work subject to the conditions stated on the reverse of this form which are incorporated in this agreement, unless modified in item 7. If you wish us to proceed with the work, please sign the original and green copy and return them with your check or money order made payable to Census, Department of Commerce, (Federal agencies use SF-1080 or SF-1081) unless other financial arrangements are provided in item 7.

7. Description of work, estimate of cost, time for completion, special conditions, and reference to incoming communication. The International Statistical Programs of the Bureau of the Census agrees to provide a senior-level team of Data Processing experts for technical assistance to the Government of Greece in evaluating their plans for the establishment of a centralized data processing facility referred to as the National Computer Center.

The estimated cost for providing the services of the senior advisors is estimated at \$17,500. This amount is to cover the salary, international travel, per diem and overhead costs for this advisory service.

Reference: Dept. of State Telegrams # ATHENS 3296 (June 70) and ATHENS 4895 (Sept. 70).

Previously submitted (Temp. Work Authorities)----- 13, 883
This submission----- 3, 617

Total----- ¹ \$17, 050

¹ An amount of \$3,500 has been reserved to meet the reimbursement claim of the National Bureau of Standards, for the short-term advisory services of Mr. Bruce Ramsey and Mrs. Ethel Marden, both of the Center for Computer Sciences and Technology, N.B.S.

☐ The amount stated above will be the final charge for the work described, provided agreement is concluded within 90 days of the date of estimate (item 8c).

☐ The final charge will be determined by the actual costs incurred.

8. Approved for the Bureau of the Census by:

a. Name:
b. Title:
c. Date:

9. Accepted on behalf of the party stated in item 5*

a. Name:
b. Title:
c. Date:

*Federal officials must be authorized to obligate funds.

10. Suggested project title: ATHENS GREECE TEAM

11. Distribution of cost estimate and number of new employees required for each division.

Dividend	Cost category	Category title	New position	Amounts
70.....	048	All in 2d quarter:		
	107	Employee benefits.....		\$473
	210	Intermittent salaries other D/R.....		8, 600
	291	Travel.....		2, 289
		Reserve-current year.....		(11, 367)
91.....	251	Federal Government other contributing services.....		3, 500
98.....	252	Government overhead.....		122
		Total.....		3, 617

12. Initials of persons preparing or reviewing estimate:
13. Budget and Finance Division approval:

THE WHITE HOUSE,
Washington, April 21, 1972.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Separation of Powers, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of March 30 requesting information concerning Executive Agreements since World War II in which the Council of International Economic Policy has participated.

As you know, the Council on International Economic Policy was only established in January, 1971 as the White House office coordinating policy recommendations to the President in the area of international economic policy. The Council limits itself to the role of coordinating policy recommendations to the President, and is not involved in the operational aspects of foreign economic policy. Thus the Council has neither concluded nor directly participated in the development of any Executive Agreement.

I should add that Executive Agreements concluded in connection with the International Trade Agreements Program will be identified by the Department of State and the Office of the Special Representative for Trade Negotiations, the agencies which have operating responsibility for this subject.

I hope the above information is responsive to the needs of your Committee. With best regards,

Sincerely,

PETER M. FLANIGAN,
Assistant to the President for International Economic Affairs.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON SEPARATION OF POWERS,
Washington, D.C., June 28, 1972.

Hon. MELVIN R. LAIRD,
Secretary of Defense, Washington, D.C.

DEAR MR. SECRETARY: I enclose a copy of my letter to you of March 30, 1972, in which I requested a list of executive agreements with foreign states entered into by the Department of Defense.

The Subcommittee is ready to go to press with the hearings on Executive Agreements which we conducted during April and May; and since we have not received your response, I should like to remind you of my request. It would be extremely helpful to the Subcommittee if we could receive your reply within the next few days.

I might mention that we have had an excellent response from the various agencies of the Government, having received, to date, thirty-five replies from the thirty-seven agencies addressed.

With all kind wishes, I am

Sincerely yours,

SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers.

ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., April 7, 1972.

Hon. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of March 30 requesting a list of all Executive Agreements entered into by the U.S. Environmental Protection Agency with foreign states.

Since its inception on December 2, 1970, EPA has not entered into any Executive Agreement with a foreign government. We have had communications with counterpart agencies overseas concerning the exchange of information

and documents and the loan of equipment. In such instances we work very closely with the Department of State.

Sincerely yours,

WILLIAM D. RUCKELSHAUS, *Administrator.*

EXPORT-IMPORT BANK OF THE UNITED STATES,
Washington, D.C., April 7, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: We have received your letter of March 30, 1972, concerning all executive agreements since World War II. Mr. Kearns is presently out of the country, so I am answering your letter on his behalf.

I understand that you have also requested a list of all such executive agreements from the State Department, and we are advised that they are sending you a very comprehensive reply.

The Export-Import Bank of the United States, as you know, has participated in some executive agreements but only in conjunction with other agencies of the Executive Branch, primarily the State Department. This Bank has never entered into an executive agreement by itself. We are informed that any participation by Eximbank will be included in the comprehensive reply which you receive from the State Department.

Eximbank does not keep any separate records concerning these agreements since all actions it takes are done pursuant to the Export-Import Bank Act of 1945, as amended (12 U.S.C. 635).

If after you have reviewed the list presented to you from the State Department you have any specific questions about Eximbank, we will be happy to try to answer those questions.

Sincerely,

J. E. CORETTE, III, *General Counsel.*

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., April 6, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of March 30, 1972, I am enclosing a list of communications agreements entered into between the United States and other countries. In view of the urgency of your request, certain additional information responsive to your letter is set out in footnotes to the list, and footnote designators have been pencilled in in the left-hand margin. The footnotes are listed below:

¹ The Commission was not in attendance at the discussions leading to the agreement, but it was called upon to provide advice and technical guidance. We are unable to cite specific authority for agreements in this category and defer in this respect to the Department of State.

^{1a} The Commission was not in attendance at the discussions leading to the agreement, but it was called upon to provide advice and technical guidance. Authority for these agreements is set out in the International Radio Regulations.

^{1b} The Commission was not in attendance at the discussions leading to the agreement, but it was called upon to provide advice and technical guidance. Authority for these agreements is set out in P.L. 88-313, May 28, 1964, 78 Stat. 202.

^{1c} The Commission was not in attendance at the discussions leading to the agreement, but it was called upon to provide advice and technical guidance. Authority for these agreements is set out in P.L. 87-795, Oct. 11, 1962, 76 Stat. 202.

² The Commission was in attendance at discussions leading to the agreement and drafted, or assisted in drafting, the agreement. We are unable to cite specific authority for agreements in this category and defer in this respect to the Department of State.

³ These agreements are bilateral or multilateral treaties concurred in by the Senate.

I trust that the information we are able to furnish will serve your purposes.

Sincerely,

DEAN BURCH, *Chairman.*

Date	Citation	Subject
1946 ¹	60 Stat. 1696 TIAS 1527.	U.S.-U.S.S.R. agreement on organization of commercial radio Teletype communication channels Signed at Moscow May 24, 1946 Entered into force May 24, 1946.
1947 ²	61 Stat. (4) 3800 TIAS 1726.	U.S.-Canada agreement providing for frequency modulation broadcasting in channels in the radio frequency band 88-108 Mc/s. Effected by exchange of notes at Washington Jan. 8 and Oct. 15, 1947. Entered into force Oct. 15, 1947.
1947 ¹	61 Stat. (4) 3416 TIAS 1676	U.S.-U.N. agreement relative to headquarters at the United Nations. Signed at Lake Success June 26, 1947. Entered into force Nov. 21, 1947. Supplemented by the agreements contained in TIAS 5961 and TIAS 6750 signed Feb. 9, 1966, and Aug. 28, 1969, respectively.
1947 ¹	61 Stat. (3) 3131 TIAS 1652.	U.S.-U.K. agreement regarding standardization of distance Measuring equipment. Signed at Washington Oct. 13, 1947. Entered into force Oct. 13, 1947.
1948 ²	UST 621 TIAS 4044.	Intergovernmental Maritime Consultative Organization (IMCO) Convention. Signed at Geneva Mar. 6, 1948. Entered into force Mar. 17, 1958. Modified by the amendments contained in TIAS 6285 and in TIAS 6490 adopted by the IMCO Assembly Sept. 15, 1964, and Sept. 28, 1965, respectively.
1949 ²	3 UST (3) 3064 TIAS 2489	Inter-American Radio Agreement between the United States and Canada and Other American Republics. Signed at Washington July 9, 1949. (Fourth Inter-American Radio Conference.) Entered into force Apr. 13, 1952, subject to the provisions of Article 13.
1949 ³	3 UST (2) 2686 TIAS 2435.	London Telecommunications Agreement between the United States and Certain British Commonwealth Governments. Signed at London Aug. 12, 1949. Entered into force Feb. 24, 1950. Amended by the agreement contained in TIAS 2705 which was signed Oct. 1, 1952.
1950 ^{1a}	3 UST (2) 2672 TIAS 2433.	United States-Ecuador arrangement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Quito March 16 and 17, 1950. Entered into force Mar. 17, 1950.
1950 ^{1a} and 1951	2 UST (1) 683 TIAS 2223.	United States-Liberia arrangement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Monrovia Nov. 9, 1950, and Jan. 8, 9, and 10, 1951. Entered into force Jan. 11, 1951.
1950 ³	11 UST 413 TIAS 4460.	North American Regional Broadcasting Agreement (NARBA). Signed at Washington Nov. 15, 1950. Entered into force Apr. 19, 1960. Effective between United States, Canada, Cuba, Dominican Republic, and the United Kingdom of Great Britain and Northern Ireland for the Bahama Islands. Ratification on behalf of Jamaica pending.
1951 ³	3 UST (3) 3787 TIAS 2508.	United States-Canada Convention relating to the operation by citizens of either country of certain radio equipment or stations in the other country. Signed at Ottawa Feb. 8, 1951. Entered into force May 15, 1952.
1951 ^{1a} and 1952	3 UST (3) 3892 TIAS 2520.	United States-Cuba arrangement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Havana Sept. 17, 1951, and Feb. 27, 1952. Entered into force Feb. 27, 1952.
1951 ^{1a}	3 UST (2) 2860 TIAS 2459.	United States-Cuba agreement concerning the control of electromagnetic radiation. Effected by exchange of notes at Havana Dec. 10 and 18, 1951. Entered into force Dec. 18, 1951.
1952 ²	3 UST (4) 4926 TIAS 2666.	United States-Canada agreement for the promotion of safety on the great lakes by means of radio. The agreement applies to vessels of all countries as provided for in article 3. Signed at Ottawa Feb. 21, 1952. Entered into force Nov. 13, 1954.
1952 ²	3 UST (3) 4443 TIAS 2594.	United States-Canada agreement relating to the assignment of television frequency channels along United States-Canadian Border. Effected by exchange of notes at Ottawa April 23 and June 23, 1952. Entered into force June 23, 1952.
1952 ²	3 UST (4) 5140 TIAS 2705.	London revision (1952) of the London Telecommunications Agreement (1949) between the United States and Certain British Commonwealth Governments. Signed at London Oct. 1, 1952. Entered into force Oct. 1, 1952. This amends the agreement contained in TIAS 2435 signed Aug. 12, 1949.
1953 ²	5 UST (3) 2840 TIAS 3138.	United States-Canada understanding relating to the sealing of mobile radio transmitting equipment. Effected by exchange of notes at Washington Mar. 9 and 17, 1953. Entered into force Mar. 17, 1953.
1956 ^a	7 UST 2179 TIAS 3617.	United States-Panama agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Panama July 19 and Aug. 1, 1956. Entered into force Sept. 1, 1955.
1956 ^a	7 UST 2839 TIAS 3665.	United States-Costa Rica agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Washington August 13 and Oct. 19, 1956. Entered into force Oct. 19, 1956.
1956 ^a	7 UST 3159 TIAS 3694.	United States-Nicaragua agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Managua Oct. 8 and 16, 1955. Entered into force Oct. 16, 1955.
1957 ²	9 UST 1037 TIAS 4079.	Multilateral Declaration between the United States and other powers terminating part II (Inter-American Radio Office) of the Inter-American Radio Communications Convention of Dec. 13, 1937 (TS-938). Signed at Washington Dec. 20, 1957. Entered into force Dec. 20, 1957. Additionally, a contract on the exchange of notifications of radio broadcasting frequencies between the Pan American Union, the United States and other powers was signed at Washington Dec. 20, 1957. Entered into force Jan. 1, 1958.
1958 ²	9 UST 1091 TIAS 4089.	United States-Mexico agreement regarding allocation of ultra high frequency channels to land border television stations. Effected by exchange of notes at Mexico July 16, 1958. Entered into force July 16, 1958.
1958 ³	10 UST 2423 TIAS 4390.	Telegraph regulations (Geneva rev., 1958). Annexed to the International Telecommunication Convention. Signed at Geneva Nov. 29, 1958. Entered into force Jan. 1, 1960.

Date	Citation	Subject
1959 ^{1a}	10 UST 1449 TIAS 4295.	United States-Mexico arrangement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Mexico July 31, 1959. Entered into force Aug. 30, 1959.
1959 ^{1a} and 1960.	11 UST 257 TIAS 4442.	United States-Honduras agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Tegucigalpa Oct. 26, 1959, and Feb. 17, 1960, and related note of Feb. 19, 1960. Entered into force Mar. 17, 1960.
1959 ^{1a} .	10 UST 3019 TIAS 4394.	United States-Venezuela arrangement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Caracas Nov. 12, 1959. Entered into force Dec. 12, 1959.
1959 ³	12 UST 2377 TIAS 4893.	International Radio Regulations Annexed to the International Telecommunication Convention. Signed at Geneva Dec. 21, 1959. Entered into force with respect to the United States Oct. 23, 1961. Revised by the partial revisions of the radio regulations, Geneva, 1959, contained in TIAS 5603, TIAS 6332, and TIAS 6590 signed Nov. 8, 1963, Apr. 29, 1966, and Nov. 3, 1967, respectively.
1960 ^{1a}	11 UST 1 TIAS 4399.	United States-Haiti agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Port-au-Prince Jan. 4 and 6, 1960. Entered into force Feb. 5, 1960.
1960 ³	16 UST 185 TIAS 5780.	International Convention for the safety of life at sea and annexed regulations. Signed at London June 17, 1960. Entered into force May 26, 1965. Corrections to certain annexes contained in TIAS 6284 signed Feb. 15, 1966.
1960 ^{1a}	11 UST 2229 TIAS 4596.	United States-Paraguay agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Asuncion Aug. 31, and Oct. 6, 1960. Entered into force Nov. 5, 1960.
1961 ^{1a}	17 UST 1574 TIAS 6115.	United States-Uruguay agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Montevideo Sept. 12, 1961. Entered into force Sept. 26, 1966.
1961 ^{1a}	12 UST 1695 TIAS 4888.	United States-Bolivia agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at La Paz Oct. 23, 1961. Entered into force Nov. 22, 1961.
1962 ^{1a}	13 UST 411 TIAS 5001.	United States-El Salvador arrangement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at San Salvador Apr. 5, 1962. Entered into force May 5, 1962.
1962 ²	13 UST 997 TIAS 5043.	United States-Mexico agreement relating to the assignment of VHF Television channels along United States-Mexican border. Effected by exchange of notes at Mexico Apr. 18, 1962. Entered into force Apr. 18, 1962.
1962 ^{1a}	13 UST 2418 TIAS 5205.	United States-Canada agreement relating to the coordination and use of radio frequencies above 30 Mc/s. Effected by exchange of notes at Ottawa Oct. 24, 1962. Entered into force Oct. 24, 1962. The technical annex to this agreement was revised by the agreement contained in TIAS 5833 signed June 16 and 24, 1965.
1963 ¹	14 UST 817 TIAS 5360.	United States-Dominican Republic agreement regarding Radio Communications between amateur stations on behalf of third parties. Effected by exchange of notes at Santo Domingo Apr. 18 and 22, 1963. Entered into force May 22, 1963.
1963 ³	15 UST 887 TIAS 5603.	Partial revision of the radio regulations, Geneva, 1959, final acts of the EARC to allocate frequency bands for space radiocommunication purposes. Signed at Geneva Nov. 8, 1963. Entered into force Jan 1, 1965.
1963 ¹	14 UST 1754 TIAS 5483.	United States-Colombia agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Bogota Nov. 16 and 29, 1963. Entered into force Dec. 29, 1963.
1964 ²	15 UST 1705 TIAS 5646.	United States-Other Governments agreement establishing interim arrangements for a global commercial communications satellite system and special agreement. Done at Washington Aug. 20, 1964. Entered into force Aug. 20, 1964. Additionally, a supplementary agreement on arbitration was done at Washington June 4, 1965. Entered into force Nov. 21, 1966.
1964 ^a	18 UST 1299 TIAS 6285.	Amendments to articles 17 and 18 of the IMCO Convention (TIAS 4044). Adopted by the IMCO Assembly at London Sept. 15, 1964. Entered into force Oct. 6, 1967.
1965 ^a	16 UST 821 TIAS 5816.	United States-Brazil agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Washington June 1, 1965. Entered into force June 1, 1965.
1965 ²	16 UST 923 TIAS 5833.	United States-Canada agreement regarding coordination and use of radio frequencies above 30 Mc/s revising the technical annex to the agreement of Oct. 24, 1962 (TIAS 5205). Effected by exchange of notes at Ottawa June 16 and 24, 1965. Entered into force June 24, 1965.
1965 ^a	16 UST 883 TIAS 5827.	United States-Israel agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Washington July 7, 1965. Entered into force Aug. 6, 1965.
1965 ²	19 UST 4855 TIAS 6490.	Amendment to article 28 of the IMCO Convention (TIAS 4044). Adopted by the IMCO Assembly at Paris Sept. 28, 1965. Entered into force Nov. 3, 1968.
1965 ³	18 UST 575 TIAS 6267.	International Telecommunication Convention. Signed at Montreux Nov. 12, 1965. Entered into force with respect to the United States May 29, 1967.
1966 ²	17 UST 74 TIAS 5961.	United States agreement regarding headquarters of the United Nations supplementing the agreement of June 26, 1947 (TIAS 1676). Signed at New York Feb. 9, 1966. Entered into force Feb. 9, 1966. Amended by the agreement contained in TIAS 6176 signed Dec. 8, 1966.
1966 ²	18 UST 1289 TIAS 6284.	Précis-Verbal of rectification to certain annexes to the International Convention for the safety of life at sea of June 17, 1960 (TIAS 5780). Done at London Feb. 15, 1966.

Date	Citation	Subject
1966 ³	18 UST 2091 TIAS 6332.	Partial revision of the radio regulations, Geneva, 1959, final acts of the EARC for the preparation of a revised allotment plan for the aeronautical mobile (R) service. Signed at Geneva Apr. 29, 1966. Entered into force for the United States Aug. 23, 1967, except for the frequency allotment plan contained in appendix 27 which entered into force Apr. 10, 1970.
1966 ²	17 UST 2319 TIAS 6176.	United States-United Nations agreement regarding headquarters of the United Nations amending the supplemental agreement of Feb. 9, 1966 (TIAS 5691). Effected by exchange of notes at New York Dec. 8, 1966. Entered into force Dec. 8, 1966.
1967 ¹	18 UST 365 TIAS 6244.	United States-Arentina agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Buenos Aires Mar. 31, 1967. Entered into force Apr. 30, 1967.
1967 ²	18 UST 1201 TIAS 6268.	United States-Canada agreement relating to presunrise operation of certain standard (AM) radio broadcasting stations. Effected by exchange of notes at Ottawa Mar. 31 and June 12, 1967. Entered into force June 12, 1967. Amended by the agreement contained in TIAS 6626 signed Apr. 18, 1969, and Jan. 31, 1969.
1967 ³	19 UST 6717 TIAS 6590.	Partial revision of the radio regulations, 1959, Final acts of the WARC to deal with matters relating to the maritime mobile service. Signed at Geneva Nov. 3, 1967. Entered into force Apr. 1, 1969.
1968 ² and 1969.	20 UST 7 TIAS 6626.	United States-Canada agreement relating to presunrise operation of certain standard (AM) radio broadcasting stations amending the agreement of Mar. 31 and June 12, 1967 (TIAS 6268). Effected by exchange of notes at Ottawa Apr. 18, 1968, and Jan. 31, 1969. Entered into force Jan. 31, 1969.
1969	20 UST 2810 TIAS 6750.	United States-United Nations agreement regarding headquarters of the United Nations supplementing the agreement of June 26, 1947, as Supplemented (TIAS 1676, 5961, 6176). Signed at New York Aug. 28, 1969. Entered into force Aug. 28, 1969.
1969 ²	TIAS 6931.	United States-Canada agreement relating to the operation of radiotelephone stations. Signed at Ottawa Nov. 19, 1969. Entered into force July 24, 1970.
1970 ²	TIAS 7021.	United States-Mexico agreement concerning radio broadcasting in the standard band (535-1605 kHz), with annexes. Signed at Mexico Dec. 11, 1968. Entered into force Nov. 18, 1970.
1970 ²	TIAS 7021.	United States-Mexico agreement concerning the operation of broadcasting stations in the standard broadcast band (535-1605 kHz) during a limited period prior to sunrise ("Pre-Sunrise") and after sunset ("Post-Sunset"), with annexes. Signed at Mexico Dec. 11, 1968. Entered into force Nov. 18, 1970.

(b) The applicable agreements in force between the United States and another country relating to the reciprocal granting of authorizations to permit licensed amateur radio operators of either country to operate their stations in the other country are as follows:

Date	Citation	Subject
1964 ¹⁴	15 UST 1787 TIAS 5649.	United States-Costa Rica agreement regarding alien amateur radio operators. Effected by exchange of notes at San Jose Aug. 17 and 24, 1964. Entered into force Aug. 24, 1964.
1965	16 UST 93 TIAS 5766.	United States-Dominican Republic agreement regarding alien amateur radio operators. Effected by exchange of notes at Santo Domingo Jan. 28 and Feb. 2, 1965. Entered into force Feb. 2, 1965.
1965	16 UST 165 TIAS 5777.	United States-Bolivia agreement regarding alien amateur radio operators. Effected by exchange of notes at La Paz Mar. 16, 1965. Entered into force Apr. 15, 1965.
1965	16 UST 181 TIAS 5779.	United States-Ecuador agreement regarding alien amateur radio operators. Effected by exchange of notes at Quito Mar. 26, 1965. Entered into force Mar. 26, 1965.
1965	16 UST 817 TIAS 5815.	United States-Portugal agreement regarding alien amateur radio operators. Effected by exchange of notes at Lisbon May 17 and 26, 1965. Entered into force May 26, 1965.
1965	16 UST 869 TIAS 5824.	United States-Belgium agreement regarding alien amateur radio operators. Effected by exchange of notes at Brussels June 15, and 18 1965. Entered into force June 18, 1965.
1965	16 UST 973 TIAS 5836.	United States-Australia agreement regarding alien amateur radio operators. Effected by exchange of notes at Canberra June 25, 1965. Entered into force June 25, 1965.
1965	16 UST 1160 TIAS 5680.	US-Peru agreement regarding alien amateur radio operators. Effected by exchange of notes at Lima June 28 and Aug. 11, 1965. Entered into force Aug. 11, 1965.
1965	16 UST 1746 TIAS 5900.	United States-Luxembourg agreement regarding alien amateur radio operators. Effected by exchange of notes at Luxembourg July 7 and 29, 1965. Entered into force July 29, 1965.
1965	16 UST 1131 TIAS 5856.	United States-Sierra Leone agreement regarding alien amateur radio operators. Effected by exchange of notes at Freetown Aug. 14 and 16, 1965. Entered into force Aug. 16, 1965.
1965	16 UST 1742 TIAS 5899.	United States-Colombia agreement regarding alien amateur radio operators. Effected by exchange of notes at Bogota Oct. 19 and 28, 1965. Entered into force. Nov. 28, 1965.

Date	Citation	Subject
1965	16 UST 2047 TIAS 5941.	United States-United Kingdom agreement regarding alien amateur radio operators. Effected by exchange of notes at London Nov. 26, 1965. Entered into force Nov. 26, 1965. Supplemented by the amendment contained in TIAS 6800 which was signed Dec. 11, 1969.
1966	17 UST 328 TIAS 5978.	United States-Paraguay agreement regarding alien amateur radio operators. Effected by exchange of notes at Asuncion Mar. 18, 1966. Entered into force Mar. 18, 1966.
1966	17 UST 719 TIAS 6022.	United States-France agreement regarding alien amateur radio operators. Effected by exchange of notes at Paris May 5, 1966, with related notes of June 29 and July 6, 1966. Entered into force July 1, 1966. Modified by the amendment contained in TIAS 6711 which was signed Oct. 3, 1969.
1966	17 UST 813 TIAS 6038.	United States-India agreement regarding alien amateur radio operators. Effected by exchange of notes at New Delhi May 16 and 25, 1966. Entered into force May 25, 1966.
1966	17 UST 760 TIAS 6028.	United States-Israel agreement regarding alien amateur radio operators. Effected by exchange of notes at Washington June 15, 1966. Entered into force June 15, 1966.
1966	17 UST 2426 TIAS 6189.	United States-Netherlands agreement regarding alien amateur radio operators. Effected by exchange of notes at The Hague June 22, 1966. Entered into force Dec. 21, 1966.
1966	17 UST 1120 TIAS 6068.	United States-Federal Republic of Germany arrangement regarding alien amateur radio operators. Effected by exchange of notes at Bonn June 23 and 30, 1966. Entered into force June 30, 1966.
1966	17 UST 1039 TIAS 6064.	United States-Kuwait agreement regarding alien amateur radio operators. Effected by exchange of notes at Kuwait July 19 and 24, 1966. Entered into force July 19, 1966.
1966	17 UTS 1560 TIAS 6112.	United States-Nicaragua agreement regarding alien amateur radio operators. Effected by exchange of notes at Managua Sept. 3 and 20, 1966. Entered into force Sept. 20, 1966.
1966	17 UST 2215 TIAS 6159.	United States-Panama agreement regarding alien amateur radio operators. Effected by exchange of notes at Panama Nov. 16, 1966. Entered into force Nov. 16, 1966.
1966 and 1967	18 UST 525 TIAS 6259.	United States-Honduras Agreement regarding alien amateur radio operators. Effected by exchange of notes at Tegucigalpa Dec. 29, 1966, Jan. 24 and Apr. 17, 1967. Entered into force Apr. 17, 1967.
1967	18 UST 554 TIAS 6264.	United States-Switzerland agreement regarding alien amateur radio operators. Effected by exchange of notes at Bern Jan. 12 and May 16, 1967. Entered into force May 16, 1967.
1967	18 UST 543 TIAS 6261.	United States-Trinidad and Tobago agreement regarding alien amateur radio operators. Effected by exchange of notes at St. Ann's and Port of Spain Jan. 14 and Mar. 16, 1967. Entered into force Mar. 16, 1967.
1967	18 UST 361 TIAS 6243.	United States-Argentina agreement regarding alien amateur radio operators. Effected by exchange of notes at Buenos Aires Mar. 31, 1967. Entered into force Apr. 30, 1967.
1967	18 UST 1661 TIAS 6309.	United States-El Salvador agreement regarding alien amateur radio operators. Effected by exchange of notes at San Salvador May 24 and June 5, 1967. Entered into force June 5, 1967.
1967	18 UST 1241 TIAS 6273.	United States-Norway agreement regarding alien amateur radio operators. Effected by exchange of notes at Oslo May 27 and June 1, 1967. Entered into force June 1, 1967.
1967	18 UST 1272 TIAS 6281.	United States-New Zealand agreement regarding alien amateur radio operators. Effected by exchange of notes at Wellington June 21, 1967. Entered into force June 21, 1967.
1967	18 UST 2499 TIAS 6348.	United States-Venezuela agreement regarding alien amateur radio operators. Effected by exchange of notes at Caracas Sept. 18, 1967. Entered into force Oct. 3, 1967.
1967	18 UST 2878 TIAS 6378.	United States-Austria agreement regarding alien amateur radio operators. Done at Vienna Nov. 21, 1967. Entered into force Dec. 21, 1967.
1967	18 UST 2882 TIAS 6380.	United States-Chile agreement regarding alien amateur radio operators. Effected by exchange of notes at Washington Nov. 30, 1967. Entered into force Dec. 30, 1967.
1967	20 UST 2883 TIAS 6766.	United States-Guatemala agreement regarding alien amateur radio operators. Effected by exchange of notes at Guatemala Nov. 30 and Dec. 11, 1967. Entered into force Oct. 2, 1969.
1967	18 UST 3153 TIAS 6406.	United States-Finland agreement regarding alien amateur radio operators. Effected by exchange of notes at Helsinki Dec. 15 and 27, 1967. Entered into force Dec. 27, 1967.
1968	19 UST 7852 TIAS 6622.	United States-Monaco agreement regarding alien amateur radio operators. Effected by exchange of notes at Nice and Paris Mar. 29, and Oct. 16, 1968. Entered into force Dec. 1, 1968.
1968	19 UST 4892 TIAS 6494.	United States-Guyana agreement regarding alien amateur radio operators. Effected by exchange of notes at Georgetown May 6 and 13, 1968. Entered into force May 13, 1968.
1968	19 UST 5994 TIAS 6553.	United States-Barbados agreement regarding alien amateur radio operators. Effected by exchange of notes at Bridgetown Sept. 10 and 12, 1968. Entered into force Sept. 12, 1968.
1968	19 UST 6057 TIAS 6566.	United States-Ireland agreement regarding alien amateur radio operators. Effected by exchange of notes at Dublin Oct. 10, 1968. Entered into force Oct. 10, 1968.
1968	20 UST 490 TIAS 6654.	United States-Indonesia agreement regarding alien amateur radio operators. Effected by exchange of notes at Djakarta Dec. 10, 1968. Entered into force Dec. 10, 1968.

Date	Citation	Subject
1969.....	20 UST 773. TIAS 6690.	United States-Sweden agreement regarding alien amateur radio operators. Effected by exchange of notes at Stockholm May 27 and June 2, 1969. Entered into force June 2, 1969.
1969.....	20 UST 2398 TIAS 6711.	United States-France agreement regarding alien amateur radio operators amending the agreement of May 5, 1966 (TIAS 6022). Effected by exchange of notes at Paris Oct. 3, 1969. Entered into force Oct. 3, 1969.
1969.....	20 UST 4089 TIAS 6800.	United States-UK agreement regarding alien amateur radio operators supplementing the agreement of Nov. 26, 1965 (TIAS 5941). Effected by exchange of notes at London Dec. 11, 1969. Entered into force Dec. 11, 1969.
1970.....	21 UST 1960 TIAS 6936.	United States-Brazil agreement regarding alien amateur radio operators. Effected by exchange of notes at Rio de Janeiro and Brasilia Jan. 26, June 19 and July 30, 1970. Entered into force June 19, 1970.
1971.....	22 UST 694 TIAS 7127.	United States-Jamaica agreement regarding alien amateur radio operators. Effected by exchange of notes at Kingston Mar. 4 and Apr. 28, 1971. Entered into force April 28, 1971.
1971.....	22 UST 701 TIAS 7129.	United States-Uruguay agreement regarding alien amateur radio operators. Effected by exchange of notes at Montevideo May 28, 1971. Entered into force May 28, 1971.
1971.....	TIAS 7239.	United States-Trinidad and Tobago agreement regarding radio communications between amateur stations on behalf of third parties. Effected by exchange of notes at Port-of-Spain Nov. 18, 1971. Entered into force Dec. 18, 1971.

According to the Commission's records the U.S. has Embassy Radio Agreements with the following countries:

Algeria, Belgium, Bulgaria, Burma, Costa Rica, Czechoslovakia, Ghana, Guinea, Hungary, Indonesia, Israel, Jordan, Nigeria, Pakistan, Poland, Rumania, Sweden, Switzerland, Thailand, Uganda, USSR, Yugoslavia, and Zaire.^{1c}

Note: The agreements with the countries of Guinea (TIAS 5365) and Israel (TIAS 5367) were formalized under the "Treaties and Other International Acts Series".

FEDERAL MARITIME COMMISSION,
Washington, D.C., April 6, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I wish to acknowledge your letter of March 30, 1972, in which you inquired about the negotiation of executive agreements which this Commission might have participated in since the end of World War II.

The only agreement falling in this category is the agreement between the United States of America and Brazil, dealing with "Consultations on Maritime Transportation", which was effected by an Exchange of Notes signed in Rio de Janeiro on September 18 and 20, 1968. This agreement was the result of meetings between shipping officials of this Government and of the Government of Brazil to discuss international shipping policies and the regulation of international shipping.

The above agreement establishes the lines of communication in case either country wishes to consult with the other on the question of shipping policy. This agreement was signed by the Charge d'Affairs ad interim of the U.S. Embassy in Rio de Janeiro.

The only other item which I might bring to your attention, so that there will be no misunderstanding, is an arrangement which was reached between the United States and the governments of the major shipping interests in Europe and Japan on December 15, 1964, which provided for an exchange of information required by the Federal Maritime Commission in its study of maritime freight rates into and out of the United States. This arrangement called for the submission of information required by the Commission in completing its foreign trade studies to assist United States trade and commerce.

If I can be of any further assistance to you, please do not hesitate to let me know.

Sincerely,

HELEN DELICH BENTLEY, *Chairman.*

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C., April 11, 1972.

Hon. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of March 30. I am pleased to be able to provide the information you requested.

The second paragraph of your letter says that "government agencies routinely enter into executive agreements with foreign states," and it goes on to ask for a list of "all executive agreements, since World War II, in which (my) . . . department has participated" and, additionally, the purpose of, and authority for, entering into such agreements.

All executive agreements concluded at the diplomatic level, and in which the Department of Health, Education, and Welfare, or its predecessor, the Federal Security Agency, have participated, have been published by the Department of State. I understand that the State Department is providing your subcommittee with a compilation of such agreements.

As for agreements made by officers of this Department, alone, there are very few. Here is a list of them:

1. Agreement between U.S. Surgeon General and Ministry of Health and Social Welfare, Poland. 1962

Purpose.—To improve the health and well being of the American people through bio-medical and other forms of health-related research funded by foreign currencies generated by P.L. 83-480.

Authority.—P.L. 83-480—P.L. 86-610.

2. Agreement between U.S. Surgeon General and Ministry of Health and Education, Burma. 1963

Purpose.—Conduct mutually beneficial health research funded by foreign currencies generated by P.L. 83-480.

Authority.—P.L. 83-480.

3. Memorandum of Understanding: DHEW and Department of National Health and Welfare of Canada. 1969.

Purpose.—To plan for post-attack exchange of health manpower.

Authority.—Civil Defense Act, 1950/Executive Order 11490.

4. Agreement between National Cancer Institute, NIH, and Ministry of the Navy, Peru. 1972

Purpose.—Conduct mutually beneficial cancer research.

Authority.—P.L. 86-610.

5. Under the authority of P.L. 83-480 and P.L. 86-610 and of a delegation of authority from the Office of Management and Budget, the constituent agencies of HEW frequently sign agreements (often contracts) with ministries of foreign governments to implement research projects in this Department's areas of interest. Each such agreement covers only a particular, individual research or research and demonstration project, and such agreements are of a narrow, and not a broad programmatic, nature. There have been hundreds of these over the years and hundreds of such agreements remain current. I shall not burden you with a detailed listing of them.

Additionally, an HEW officer on one occasion signed an agreement with an institution of a foreign government under the rubric of an executive agreement made at the diplomatic level. In this instance, I, as Secretary, exchanged letters with the Soviet Minister of Health in February, 1972, establishing a program in joint health research. This exchange of letters took place within the framework of the biennial U.S.-U.S.S.R. Cultural Exchange Agreement.

I trust this information will prove useful to you and the subcommittee.

With kindest regards,

Sincerely,

ELLIOT L. RICHARDSON, *Secretary.*

THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Washington, D.C., April 5, 1972.

Hon. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Enclosed is a copy of the HUD portion of the June, 1971 Committee print on *Study of International Housing, Reports from US*

Agencies and International Organizations, prepared for the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking, Housing and Urban Affairs. This document contains the information requested in your letter. Legislative authority for HUD's international program activities is cited on page 49. The material dealing with our bilateral program begins on page 14, with page 16 showing a "HUD Bilateral Program Summary" as of April, 1971.

Since the publication of the Committee print, HUD has entered into an exchange of memoranda of understanding with the United Kingdom (July 20, 1971) and Spain (October 28, 1971). Copies of these memoranda are enclosed. Also enclosed is an informal historical outline of HUD's (and its predecessor agencies) international programs since 1944.

We have negotiated an agency-to-agency Memorandum of Understanding with the Canadians, to be signed in the near future. We also plan to pursue the possibility of a similar arrangement with our German counterparts, although we have had some minimal relations under the Interior Department sponsored US-German Cooperative Program in Natural Resources, Pollution Control, and Urban Development (UGNR) since 1967.

I take this opportunity to emphasize that real involvement in bilateral programs is relatively new for the Department, especially in the context of agency-to-agency arrangements. In a sense we are in an exploratory phase in these relationships, but the experience of other departments, and our own experience so far, suggests that these procedures are valuable and fruitful in gaining information and experience of benefit to our domestic operations and our research programs. These relationships also provide mechanisms with which to facilitate direct foreign interest in our programs and they permit us to satisfy American professional interests in foreign programs in a manner supporting the Department's own priorities and responsibilities. It is our belief that we have things to learn in the area of urban development from the experience of other developed countries, and that we should tap and organize this experience and disseminate it to the people in the US who can use it. We believe this method of agency-to-agency exchange and cooperation is the best way to extend our urban knowledge at a modest cost.

If you should need additional information, please do not hesitate to let me know.

Sincerely,

GEORGE ROMNEY.

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding between the Department of Housing and Urban Development (HUD) of the United States and the Department of the Environment of the United Kingdom outlines a program for cooperation in matters concerning the urban environment falling within their competence, such as physical planning, urban management, housing and building technology, and community development. The goal of this program is to achieve the maximum exchange of experience in specified subject areas. The program will include an organized exchange of documents and visits and may be extended as mutually agreed to such other activities as expert consultations, the long-term exchange of scholars and professionals, or joint research projects. In carrying out specific activities under this Memorandum of Understanding, the Department of Housing and Urban Development may invite participation by other U.S. departments and agencies or private groups; the Department of the Environment may similarly invite participation by other agencies and organizations in the United Kingdom.

The general subject areas for initial cooperation may include, but are not limited to, community and regional planning, construction technology, housing management and financing, citizen participation, program evaluation techniques, policy and legislation. These general subject areas may be expanded, added to, or modified by mutual agreement. Further discussions and exchange of correspondence will further define these general areas, and it is specifically envisaged that joint projects of mutual interest, when proposed by either side and accepted by the other, will be undertaken.

The program will begin with the early exchange of views on the establishment of a mutually acceptable program. This first exchange will further define the interests of each country in the other's specific programs and legislation.

Visits of experts and teams may be made thereafter without regard to reciprocity at the option of the visiting agency and subject to arrangements with the host agency. Each side will bear its own travel and related living costs under the program.

It is understood that the pace of the program outlined in this Memorandum of Understanding will be contingent upon the availability of funds and other resources on each side.

This Memorandum of Understanding will become effective when signed by authorized representatives of the Department of Housing and Urban Development of the United States and the Department of the Environment of the United Kingdom and will remain in effect for five years. It may be renewed by mutual agreement, and may be terminated at any time by either party on thirty days' notice.

MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES AND SPAIN

Within the scope of mutual understanding and collaboration provided for by Chapter IV of the Friendship and Cooperation Agreement between Spain and the United States, signed on August 6, 1970, this Memorandum of Understanding between the U.S. Department of Housing and Urban Development and the Ministry of Housing of Spain outlines a program for cooperation in matters concerning the urban environment falling within their competence, such as housing, building technology and urban and regional planning and management. The goal of this program is to achieve the maximum exchange of experience in specified subject areas. The program will begin with an organized exchange of documents and visits and may be extended as mutually agreed to such other activities as expert consultations, the long-term exchange of scholars and professionals, or joint research projects. In carrying out specific activities under the Memorandum of Understanding, the Department of Housing and Urban Development may invite participation by other U.S. departments and agencies or private groups; the Ministry of Housing may similarly invite participation by other agencies and organizations in Spain.

The general subject areas for initial cooperation may include, but are not limited to, urban and regional planning and management, including new town planning; statistics, data processing and urban information systems; building technology; and housing programs, including market analysis and financing. These general subject areas may be expanded, added to, or modified by mutual agreement. Further discussions and exchange of correspondence will further define these general areas, and it is specifically envisaged that joint projects of mutual interest, when proposed by either side and accepted by the other, will be undertaken.

Apart from an immediate exchange of bibliographic material, basic programs and technical documents, the program will begin with an exchange of experts within six months from the date of this Memorandum. This first exchange will further define the interests of each country in the other's specific programs. The visits of experts will be made at the option of the visiting agency and subject to arrangements with the host country. Each side will bear its own travel and related living expenses under the program.

It is understood that the pace of the program outlined in this Memorandum of Understanding will be contingent upon the availability of funds and other resources on each side.

This Memorandum will become effective on the date of its signature and is to run concurrently with the term of the Friendship and Cooperation Agreement, and may be renewed independently of the Agreement upon agreement of both parties.

OFFICE OF INTERNATIONAL AFFAIRS—CHRONOLOGY ON INTERNATIONAL HOUSING

1944

The National Housing Agency (NHA) established an office to maintain liaison with other governments on housing matters. It also suggested the establishment of clearing house machinery to assure the exchange of housing data which might be of value to all governments. Bilateral exchange and technical assistance programs that first year involved Britain, France and Sweden, with assistance to less developed countries in South America, the Caribbean, Africa and the Far East.

1945

NHA's Technical Division provided technical assistance to some 30 countries, and complete sets of information on housing were distributed through 62 U.S. Embassies, legations and consultates all over the world.

In recognition of the growing need for data exchange, technical assistance in the reconstruction of Europe, and control of scarce commodities, U.S. Housing Attache posts were established in US Embassies in London, Paris and Rome to carry out and supervise these functions.

1946

NHA representatives sat on five interdepartmental committees on international affairs, worked with the Pan American Union, the UN, and numerous other international bodies. The Technical Division instituted a training program which handled 100 visitors from 35 countries, and assigned UNRRA-sponsored architects from seven countries to apprenticeship program with the Agency.

1947

The Housing and Home Finance Agency (HHFA) was established as successor to NHA and HHFA officials participated in many international housing activities. An HHFA representative served as a part-time consultant to the UN Secretariat on housing questions; an HHFA staff member was housing adviser to the American Mission for AID to Greece; and another was housing adviser to the US delegation to the Economic Commission for Europe. About 100 missions from countries in both hemispheres came to the US to study US housing policies and methods.

Reporting systems were established with various US Embassies, and a steady flow of incoming data was reviewed, classified and reported on accession lists for the use of the US housing industry.

1948

During 1948, the world-wide housing crisis deepened. The Housing Act of 1948 was passed during a special session of Congress in August 1948, "to develop and promote and standardized building codes, standardized dimensions and methods for the assembly of homebuilding material and equipment" and appropriated an additional \$300,000 for research.

HHFA took part in the systematic examination of information from other countries which could be tapped for use in the US, advised American non-governmental groups on the methods of other countries, and continued cooperation with other agencies of the Government on international aspects of housing subjects.

1949

Official recognition of HHFA's well established international role in foreign assistance was forthcoming through a State Department directive to the Agency to "assign experts abroad, train foreign housing and planning officials, and establish tropical housing research stations. HHFA's role included full responsibility for the housing element of the proposed Point Four Program of technical assistance to developing countries.

Further cooperation developed through the State Department with international organizations such as the UN, on experience in tropical housing and the assembly of national experience for UN publication; the Economic Commission for Europe Subcommittee on Housing; the Pan American Union on the agenda and documentation for regional seminars for experts in housing and city planning. Documents were exchanged with similar agencies in foreign countries. Materials were also provided to the State Department for exhibits in Japan, Yugoslavia, Uruguay and other countries, and to the Voice of America.

1950

The International Housing Activities Office of the HHFA was established and continued to service the US housing industry and US international programs. HHFA received 95 missions from foreign countries, an increase of 50% over 1949.

Eighteen-hundred documents relating to foreign housing were acquired, reviewed and cataloged. A reporting system was developed between HHFA and the State Department for the guidance of US embassies and consulates. Comprehensive reports were received from US missions in 55 countries.

1951

Under the Point Four Program, HHFA became heavily involved in technical assistance programs and sent a five-man team to Germany for a 15 project demonstration program in reconstruction.

HHFA's International Activities Staff published a manual on "Aided Self-Help Housing Techniques," and assisted in the establishment of the Inter-American Housing Research and Training Center (CINVA) in Bogotá, Colombia.

Work with international organizations increased during the year. Included were UN activities in building documentation and building research in Europe, a housing survey mission to South Asia, the multilateral Technical Assistance Program involving housing in a number of countries such as Israel, Pakistan and El Salvador, International Bank activities in Iraq, Costa Rica and Guatemala required advice and assistance from HHFA.

The Agency established new relationships for the exchange of housing publications and information with housing and research organizations abroad. The routine exchange of information on housing increased markedly—during the year, a total of about 2400 documents were received and cataloged. The more important were abstracted and made available in the form of a monthly bulletin to the Agency's technicians in the US and in US housing missions abroad.

1952

HHFA staff service continued to US agencies, public and private, and cooperation with international programs abroad continued. Inquiries from abroad exceeded 600 from 50 countries; approximately 100 official visitors were received and briefed. Training of foreign nationals continued, and HHFA staff represented the US in international congresses and conferences on housing and town planning.

The Administrator represented the US at the 8th Pan American Congress of Architects in October 1952, and the Assistant to the Administrator traveled to advise the staff of the Inter-American Housing Research and Training Center at Bogotá, Colombia, to the Caribbean area to advise on aided self-help for shelter improvement, and to advise governments in Southeast Asia.

1953

After nine years of complete responsibility for the housing component of the US foreign assistance program, the newly formed Foreign Operations administration (FOA) assumed administrative responsibility for technicians abroad. HHFA continued to provide personnel and all training, documentation and technical services.

HHFA, in addition to helping FOA select personnel for foreign housing and planning missions, assisted in drafting policies and programs for these missions to help overcome serious housing problems in countries receiving technical assistance under FOA programs.

HHFA also trained foreign nationals in housing and town planning who were brought to the US either under the auspices of the FOA or the UN. HHFA conducted training programs, planned studies, itineraries and programs for about 50 such individuals.

1954

The first formal operating agreement with the Foreign Operations Administration was signed (PASA). The agreement covered reimbursable services rendered by HHFA for: (1) nominating and training US housing technicians for overseas assignments; (2) providing technical advice at FOA request; (3) consultation with FOA officials on operation of housing programs in foreign countries; (4) arranging for the training of foreign nations in the US.

The Assistant to the Administrator for International Housing Activities, on invitation of the UN, attended a UN Seminar and International Housing Exhibition in India, and also served as Housing Adviser to the US delegation to

the 10th Inter-American Conference of the OAS. The International Housing Adviser was detailed for about 2 months to FOA to consult with the US Operations Missions and the Governments of Nationalist China, the Philippines and Indonesia.

1955

New emphasis was given to UN and OAS activities with the International Staff involved with the International Council for Building Documentation in Paris and with the Bogotá Research Center (CINVA).

Forty HHFA—International Cooperation Administration (successor to FOA) technicians went abroad and started five new programs in Guatemala, Cambodia, Korea, Costa Rica, and Italy. Programs were arranged for 24 training participants from 12 countries. Countries in which US housing and planning advisers and technicians were serving with the ICA as of December 1955 were: Italy, Cambodia, Formosa, Indonesia, Korea, Egypt, Iran, Israel, Liberia, Turkey, Pakistan, Brazil, British Guiana, Trinidad, Surinam, Barbados, Chile, Colombia, Costa Rica, Guatemala, El Salvador and Nicaragua.

A technician from the international staff spent 2 months advising the new housing research center established in Egypt with the assistance of the ICA. Another staff technician visited Japan, Viet Nam, Thailand, Cambodia, India, Iran, Iraq and Greece to consult with and advise ICA officials and local Government officials on solutions to their housing problems.

1956

The international staff became the International Housing Service (IHS) in January 1956. It provided US representation at the ECE, trained 77 participants for the ICA and provided services and information for 113 official visitors from 35 nations.

Improvements were made in coordinating the work of the US in the international housing field with the housing activities of the UN and OAS. The international staff assisted the Department of State in connection with the assembly of information and the preparation of US position papers for the guidance of representatives at a number of international conferences.

IHS represented the US at the first Inter-American Technical Meeting on Housing and Planning, Bogotá, and provided a finance team to South America to assess the potential for what was to be the new Savings and Loan Industry.

1957

The IHS planned and supervised study program in the US and Puerto Rico for 269 training participants from 34 countries sponsored by the Department of State, ICA, the US and the European Productivity Agency. In addition, information and assistance in planning itineraries in the US were provided to 166 official visitors coming from 4 countries. The total of all foreign visitors for the year was 375 from 50 different nations.

Technical support of the ICA bilateral programs continued and at the request of ICA, various country programs were reviewed and evaluated; answers were provided for special questions on housing law, finance, architecture, site planning, utilities and related problems; and guidance was provided on special problems in aided self-help housing.

For the first time in the international cooperation program, IHS provided orientation and briefings on the HHFA/ICA training programs for foreign nationals to 12 US Training Officers who were assigned by ICA to the following countries: Bolivia, Ecuador, USRO/Paris, Indonesia, Iran, Libya, Pakistan, Thailand, and Taiwan.

1959

The Office of International Housing succeeded to the role played by the International Housing Service. Three divisions were established to better permit a limited staff to handle an increasing workload.

The year saw both national and international policy changes directed to the support of international housing activity. A directive from the Committee of Foreign Economic Policy to "promote home ownership abroad" was the first of its kind giving clear direction to all agencies concerned with foreign housing.

With the State Department's approval, HHFA became the US member of the International Council for Building, Research Studies and Documentation (CIB) with the Assistant Administrator for International Housing being appointed to the Executive Committee.

As a service to domestic organizations, staff members participated in the World Housing Forum of the New York Chapter of the AIA, the National Congress of American Indians, the National Association of Homebuilders Conventions and Exhibition in Chicago, and represented HHFA on the International Committee of the National Association of Housing and Redevelopment Officials.

Training programs were arranged for 413 foreign visitors from 60 countries to the US for periods varying from 5 weeks to 12 months under programs sponsored by ICA, the State Department, the UN, OAS and their own governments.

1960

The 21 American Republics in the "Act of Bogotá" gave housing a high priority in the programs for economic and social betterment in Latin America. The US Delegation at the Conference pledged a half billion dollars to a program which, among other things, would help mobilize local financial resources in each country as a means to improve housing.

Congress directed the Development Loan Fund to include housing in its objectives, and the Assistant Administrator for International Housing, among others, recommended greater use of local foreign currencies paid to the US for the sale of Government-owned farm products for financing housing and community facilities (PL 480 funds).

At the State Department's request, OIH drafted 7 position papers for US delegations at international meetings. The International Housing Architect of the OIH Staff (Director of the Division of Documentation) served as US Delegate at the Bangkok Meeting of the Working Party on Housing and Building Materials of the UN Economic Commission for Asia and the Far East.

At the request of several US embassies and missions, OIH informed pertinent trade associations of business opportunities in the field of housing. It also made available to the US housing industry and professionals information on foreign developments in the field of housing and planning.

OIH responded to 949 requests from US sources and 513 from foreign sources for information on the US and foreign housing, planning and technology. OIH also produced and published another in the Ideas and Methods Exchange series on the establishing of savings and loan associations in less industrialized countries. Technical films were also loaned during the year to 17 US and 10 foreign borrowers.

1961

The Foreign Assistance Act of 1961 gave significant new emphasis to the unique role played by the Office of International Housing in the fields of international housing and urbanization. Both US policy and that of the United Nations took strong note of the need for simultaneous economic and social development in the growth of underdeveloped countries.

The Congress launched the Alliance for Progress and appropriated \$500 million for a large scale social and economic development program for Latin America. High priority in this cooperative international effort was accorded to housing and community facilities.

The Inter-American Development Bank made loans or commitments to aid housing or urban facilities in a number of countries. Emphasis was on aided self-help and establishment of savings and loan associations.

In connection with the above activities, HHFA personnel visited South American countries to give advice and assistance in setting up housing programs, drafting effective legislation, installing financial procedures and controls, and provided services as needed. OIH also prepared for the Inter-American Development Bank detailed reports on housing needs in 16 Latin American countries.

The Office of International Housing continued to give important support to the UN and the ECE. For the first time, the ECE adopted a work program for the future which emphasized urbanization and urban problems.

1962

As the result of an agreement with the Agency for International Development (successor to ICA), OIH services became still broader. For example: HHFA assisted in developing criteria to be used in reviewing loan applications in housing and related fields.

Seven consultants were drawn from the staff of HHFA for assignments in Egypt, Dominican Republic, Surinam, Iran, Pakistan and Argentina, and program were arranged for 100 foreign nationals who came to the US to be trained. HHFA took on a new role of identifying technicians for UN missions, and in developing and supervising training programs for UN participants coming to the US.

1963

At the request of AID, OIH assumed responsibility for serving as the Secretariat for the "AID Housing and Urban Development Advisory Committee." In this capacity, HHFA provided the committee with technical backstopping, resource material and research.

An unprecedented 800 requests were received for a wide range of technical publications on such diverse topics as establishing savings and loan associations and the stabilization of soil for mud-brick construction. The dissemination of information was fast becoming one of the most important means of making available American housing skills and experiences and those of foreign countries, available to developing nations.

Observation tours for high ranking foreign officials visiting the US such as may-

In addition to its usual training program, OIH also briefed and arranged observers, city councilmen, directors of housing agencies, as well as architects, builders, economists, lawyers and city planners.

1964

Of outstanding significance in 1964 was the launching of an intern program whereby foreign participants shared with American interns the opportunity to work and study in many parts of the Agency over a three to twelve month period. That year, UN fellows, AID participants, together with persons studying or observing here under various other programs numbered 469.

AID's Housing Investment Guaranty Program (HIG), begun in 1963, insures US investors abroad against loss of his investment in an AID-approved housing investment project—in the manner FHA insures mortgages in the US. OIH's functions now broadened to include consultation services to the HIG program. 73 applications were received the first year from 15 countries.

Training programs were expanded to include a new foreign international program, and held the first session at Loyola University with 29 participants and OIH staff. OIH staff also carried out IAD-sponsored programs in 10 countries, and an assessment was made of secondary mortgage lending capabilities of the Central American Development Bank.

Cooperation with the Peace Corps began with OIH field seminars in Gabon, and the briefing of Peace Corps Volunteers in Washington.

1965

The Department of Housing and Urban Development (HUD) was created as a Cabinet post, and the designation of "International Housing" was dropped in favor of "International Affairs" to reflect the broadened interests and objectives of both domestic and international programs of the Agency.

37 HUD staff were sent to 19 countries during the year to supply consultation services on earthquake and war reconstruction, native housing programs, housing finances, market analysis, codes and standards, and other subjects.

Further activities with the UN, OECD, CIB and other international organizations were directed to information exchange, the formation of policy and a search for resources to meet newly recognized domestic needs. That year saw the beginning of a bilateral program directed specifically to the solution of domestic problems, with the Soviet Union being among the first countries showing interest.

The first group program, The Urban Development Seminar #1, was conducted. Fifty-six policy level officials from twenty-nine countries studied urban

planning and urban problems in Washington, Baltimore, Philadelphia, Norfolk and San Juan.

1966

The Division of International Affairs was created to maintain close cooperation with the State Department and the international agencies to assure free and ample exchange of information on housing, building and urban planning between the US and other countries.

Study programs, internships, and visitors totalled 823. 508 other official, professional and business representatives financed by their own governments also were programmed. 22 participants from 11 countries participated in an urban and regional planning workshop which presented various aspects of planning in a small, medium and large US city.

For the first time, the US Government was host to a UN seminar in Pittsburgh, with urbanization as the theme. HUD provided the chairman, two technical papers, and professional participation, including an address by the Secretary.

1967

A particularly significant undertaking in 1967 was the HUD sponsorship, jointly with AID and the State of Hawaii, of the Pacific Conference on Urban Growth in Honolulu in May. More than 120 delegates from 17 Asian countries and three territories attended. The Under Secretary and other senior officials of HUD took leading parts in the conference program.

Working in close cooperation with AID, HUD continued to provide information and training for foreigners visiting the US together with technical support and assistance to US Government programs abroad. About 900 visitors participated in HUD training and education programs.

This period was one of considerable activity in house research and documentation directed to the less developed countries, and a corresponding improvement in the capacity to respond to technical requests. Housing finance, water supply, program management, secondary mortgage markets, dwelling design and urban planning were among the subjects for response to AID requests for field service.

This year also saw the peak in FHA intensive activity under the AID HIG Program which was to total some 160 cases recommended as feasible over a seven year period.

1968

HUD took part in preparations for the observance of Human Rights Year decreed by the UN and proclaimed by the President.

HUD's Division of International Affairs played a major role in helping organize the US portion of the Fourth Triennial Congress of the International Council for Building Research Studies and Documentation (CIB) in Canada.

Other international meetings attend by HUD representatives included the 1968 meeting of the Committee on Housing, Building and Planning of the Economic Commission for Europe, followed by a tour of the USSR; a bilateral discussion team meeting with Irish officials in Dublin, and a conference in Turkey on the subject of earthquakes.

More than a hundred additional European sources of research reports and other technical and professional information were identified during the year, and an exchange relationship established between them and the HUD library.

A unique three way cooperative effort was developed in the Ivory Coast. HUD's Division of International Affairs staff trained 18 Peace Corps volunteers to work on housing problems there. The Peace Corps then supervised the building of more than 3,000 houses there. About 1200 visitors participated in HUD education and training programs.

1969

With the reorganization from the Division to the Office of International Affairs, OIA began to implement service to US programs in a manner never achieved in the previous 25 years of international operations. A major step was to strengtben the bilateral program and take steps for its systematic implementation.

The Office joined in a new effort on "Innovation in Urban Management" including the feasibility study of an international information system within the OECD.

A total of 1285 foreign visitors and teams visited HUD to observe and study US housing, building and planning policies, techniques and institutions.

Technical data and advice were provided to more than 50 countries in all parts of the world. The Office undertook several activities at the request of AID looking toward Viet Nam's rehabilitation needs. A special workshop was held at Fresno State College, Cal. for 57 Vietnamese graduate and undergraduate students on the concept of aided self help housing.

A two-week program was conducted for an official team of 7 Germans. It featured anti pollution programs, city planning, mass transit and urban renewal.

A nine man delegation to the UK was led by the Secretary for a comprehensive review of British problems in land planning, new towns and industrialized housing.

1970

HUD became the lead agency, with the Department of Interior, Commerce, HEW, and Transportation, in US-French cooperation on the French experimental new city of Le Vaudreuil to be built in Normandy about 20 miles southeast of Ronen, France. According to plans announced by the French Government, Vaudreuil will be the world's first urban center designed to control noise and pollution.

HUD's Secretary announced the appointment of a HUD official as Urban Affairs Officer to the US Embassy in Paris. The Urban Affairs Officer, the only one at any US Embassy abroad, will coordinate the US-French cooperative effort on Le Vandreuil. The Program is to be conducted under the guidance of HUD's Assistant Secretary for Research and Technology, and administered by the Director of International Affairs.

On July 17, 1970, a Memorandum of Understanding was signed with Japan covering a program of cooperation in areas of building technology and urban affairs.

A team of US experts visited Japan in December as a follow-on to the signing of the Memorandum of Understanding. The visit, headed by the FHA Assistant Commissioner focused on housing production and mortgage finance, and governmental programs.

The Office continued to serve as HUD's principal liaison with the Department of State in implementing the exchange of information

1971

Memorandums of Understandings were signed with Sweden, the UK and Spain on cooperation and information exchange in the field of housing, urban development, and the environment.

The Secretary visited Spain, the UK, France and West Germany for high level discussions in the field of housing technology and best use of both US and European expertise in many fields.

The Spanish Minister of Housing visited HUD Headquarters, new towns in the US and BREAKTHROUGH sites in October. During the visit, the Memorandum of Understanding was signed, and the Minister was briefed on HUD's domestic programs. During the week's visit, discussions were held on implementation of information exchange in many fields of housing technology, to be amplified later by correspondence and visits.

HUD staff sat on the COSATI Panel for International Information Activities, which has broad representation from both government and non-government agencies. The Panel makes recommendations to the Administration on the exchange and dissemination of information on both the national and international scale.

The year saw initiation of HUD International BRIEF, a new series summarizing technical studies and longer reports on important subjects; HUD International Supplements, a quarterly reprinting long articles by foreign experts on timely subjects, HUD International Information Sources Series, a bibliographic series; the Basic Technology Series; and new country program studies on Peru, Israel, Panama and the UK. Four new Ideas and Methods Exchange studies were done on: Industrialized Housing in Less Developed Countries;

Strengthening Urban Administration in Developing Countries with Emphasis on Latin America; Planning Sites and Service Programs; Cooperative Housing.

Slide presentations for use in visitor briefings and HUD interface uses were made on the following subjects: HUD Programs and Activities; Operation BREAKTHROUGH; and Urban Renewal. Prints were made and distributed to HUD Area and Regional Offices.

Information on International Housing was prepared for the Subcommittee on Housing and Urban Affairs, and the Office of International Affairs section was published separately for use as an information source to office visitors, both American and overseas.

For the months of October and November alone the following visits were programmed by OIA staff: 55 German cooperative housing specialists; 50 Japanese members of a housing study mission; 10 French housing specialists for discussions on Le Vaudrenil; an ECE study mission on industrialized housing; 125 Dutch architects in the US to study urban renewal, metropolitan planning and public housing programs; 26 AID leadership seminars for several hundred overseas participants studying in American universities and colleges. By the end of 1971 OIA had made arrangements for 2,000 visiting experts from 60 countries.

The Undersecretary of HUD headed a team visit to Sweden, Finland, and Russia as part of the arrangements made under the HUD-Swedish Memorandum of Understanding for the exchange of expert teams in selected areas of housing technology.

UNITED STATES DEPARTMENT OF THE INTERIOR.

OFFICE OF THE SECRETARY,
Washington, D.C., April 12, 1972.

DEAR SENATOR ERVIN: Thank you for giving us the opportunity to participate in your Subcommittee's examination of executive-legislative relations in foreign affairs.

I am attaching a copy of a statement listing the executive agreements relating to our activities abroad with copies of the agreements and related materials. You will note these agreements are between this Department and counterpart agencies abroad; therefore, they would not come within the scope of your study if it is restricted to agreements between Government agencies "with foreign states."

In the event you are interested in our agency-to-agency agreements, I might point out such agreements were entered into with the concurrence of the Department of State; funds required in implementing provisions of the agreements are appropriated by the Congress. A statement giving statutory authorities for implementing these agreements is also attached.

Please let me know if we can provide you with any additional information.

Sincerely yours,

W. T. PECORA,
Under Secretary of the Interior.

AGREEMENTS RELATING TO INTERIOR DEPARTMENT'S FOREIGN ACTIVITIES

1. Memorandum of Agreement between the Department of Indian Affairs and Northern Development of Canada, and the Department of the Interior of the United States for the protection from forest fires of land within the Yukon territory in Canada and the State of Alaska in the United States.

Purposes: To cooperate in detecting and suppressing forest fires by designating an area along the boundary separating the Yukon territory and the State of Alaska within which such cooperation may be achieved and thereby exercise more effective control over any fire in the territory of one of the Parties which may escape to the territory of the other Party.

2. Memorandum of Understanding between the Federal Ministry for Education and Science of the Federal Republic of Germany and the Department of the Interior of the United States of America on Cooperation in the Field of Magnetohydrodynamic Energy Conversion.

Purposes: To exchange information and scientific technical, personnel, to hold periodic meetings of scientific and technical personnel and to execute cooperative scientific and technical projects to the mutual benefit of domestic MHD research and development programs. Participants in such activities from either side may be government agencies, universities, industries, and other institutions involved in MHD research and development.

3. During FY 1972 the Department is initiating agreements with research organizations in Poland and Yugoslavia to use \$500,000 in counterpart funds for earth science and related research projects in those two countries. Work on twelve projects will begin before June 30, 1972—in mine safety research, minerals exploration techniques, utilization of earth resources, and water desalination.

Research projects are designed to complement work being done in the Department; this can speed up results. Excess foreign currencies also support work that can be done more easily overseas because of unique resource relationships or because institutions and individuals have exceptional ability and experience in fields of interest to us.

Several research avenues are usually required to obtain the best answer to a research problem. The availability of excess foreign currencies allows an additional number of the options to be explored simultaneously and thus shortens the lead time needed to achieve the most meaningful results.

The use of additional scientists and institutional facilities with different perspectives from our own may lead to new insights into the resolution of technical problems.

Foreign field locations often offer an exceptional opportunity for work comparing research results and techniques that have been tested only at domestic sites.

Contacts stemming from cooperative research tap a repository of past and future research data and expertise that would not otherwise become available to us.

The availability of excess foreign currencies allow us to use a financial source now to serve our domestic research needs and, at the same time, to benefit U. S. foreign policy.

4. Agreement between the United States of America and Saudi Arabia, Effected by Exchange of Noted Signed at Jidda November 11 and 19, 1965.

Purpose: To develop data and information which may be of significance in further research and development in the field of saline water conversion.

STATUTORY AUTHORITIES USED BY THE DEPARTMENT OF THE INTERIOR IN IMPLEMENTING AGREEMENTS WITH COUNTERPART FOREIGN ORGANIZATIONS

1. Reciprocal Fire Protection Agreement Act, 1955, 69 Stat 66 42 USC 1856A, P.L. 84-46, which provides:

"Each agency head charged with the duty of providing fire protection for any property of the United States is authorized to enter into a reciprocal agreement, with any fire organization maintaining fire protection facilities in the vicinity of such property, for mutual aid in furnishing fire protection for such property and for other property for which such organization normally provides fire protection."

2. Public Law 91-190, 91st Congress, S. 1975, January 1, 1970 (83 Stat. 852), cited as the "National Environmental Policy Act of 1969," "which provides, in part:" Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * (E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment. * * *

3. Public Law 89-554, September 6, 1966 (80 Stat. 436) which provides, in part: "Sec. 4110. Expenses of attendance at meetings. Appropriations available to an agency for travel expenses are available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities."

4. Public Law 85-507, 85th Congress, S. 385, July 7, 1958, cited as the "Government Employees Training Act" which provides, in part: "Sec. 3. For the purposes of this Act— * * * (5) the term "training" means the process of providing for and making available to an employee, and placing or enrolling such course, curriculum, subject, system, or routine of instruction or education, in scientific, professional, technical, mechanical, trade, clerical, fiscal, administrative, or other fields which are or will be directly related to the performance by such employee of official duties for the Government, in order to increase the knowledge, proficiency, ability, skill, and qualifications of such employee in the performance of official duties; * * * (7-B) any foreign government or international organization, or instrumentality of either, which is designated by the President as eligible to provide training under this Act, * * * Sec. 19(b). Hereafter any appropriation available to any department for expenses of travel shall be available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of those functions or activities * * *"

5. Public Law 87-626, 87th Congress, S. 981, September 5, 1962 (76 Stat. 427), which provides, in part: "That the authority of the Secretary of the Interior, exercised through the Geological Survey of the Department of the Interior, to examine the geological structure, mineral resources, and products of the national domain, is hereby expanded to authorize such examinations outside the national domain where determined by the Secretary to be in the national interest.

6. Public Law 92-60, 92nd Congress, S. 991, July 29, 1971, cited as "The Saline Water Conversion Act of 1971," which provides, in part: "Sec. 5. In carrying out his functions under this Act, the Secretary may— * * * (f) assemble and maintain pertinent and current scientific literature, both domestic and foreign, and issue bibliographical data with respect thereto; (g) cause on-site inspections to be made of promising projects, domestic and foreign, and, in the case of projects located in the United States, cooperate and participate in their developments when the purposes of this Act will be served thereby; (h) foster and participate in regional, national, and international conferences relating to saline water conversion; (i) coordinate, correlate, and publish information with a view to advancing the development of low-cost saline water conversion projects; * * *" "Sec. 10 (c). Not more than 2 per centum of the funds to be made available in any fiscal year for research under the authority of this Act may be expended, subject to the approval of the Secretary of State to assure that such activities are consistent with the foreign policy objectives of the United States, in cooperation with public or private agencies in foreign countries for research useful to the program in the United States."

7. Public Law 1024, 84th Congress, 2nd Session, S. 3275, August 8, 1956, (70 Stat. 1119; as amended 70 Stat. 1122), the Fish and Wildlife Act of 1956, which provides, in part: "Sec. 742(f). Policies, procedures, and recommendations * * * The Secretary, with the assistance of the departmental staff herein authorized, shall— * * * (5) take such steps as many be required for the development, management, advancement, conservation, and protection of wildlife resources through research, acquisition of refuge lands, development of existing facilities, and others means * * *"

8. Public Law 480-83, 83rd Congress, S.2475, originally enacted July 10, 1954, (68 Stat. 454), as amended through December 31, 1966, cited as the "Agricultural Trade Development and Assistance Act of 1954," which provides, in part: "Sec. 104. Notwithstanding any other provision of law, the President may use or enter into agreements with foreign countries or international organizations to use foreign currencies, * * * (b) For carrying out programs of the United States Government agencies to * * * conduct research and support scientific activities overseas including programs and projects of scientific cooperation between the United States and other countries * * * and promote and support programs of * * * scientific research."

MEMORANDUM OF AGREEMENT

The Department of Indian Affairs and Northern Development of Canada, and the Department of the Interior of the United States of America,

Considering that the Government of Canada (hereinafter called "Canada") and the Government of the United States of America (hereinafter called "the

United States") have under their respective charges the protection from forest fires of lands within the Yukon Territory in Canada and the State of Alaska in the United States; and

Considering that it has been decided to enter into an agreement for mutual co-operation between Canada and the United States in the detection and suppression of forest fires by designating an area along the boundary separating the Yukon Territory and the State of Alaska within which such co-operation may be achieved and thereby exercise more effective control over any fire in the territory of one of the Parties which may escape to the territory of the other Party;

Agree as follows:

1. In this agreement,

(a) "Party" or "Parties" means the Department of Indian Affairs and Northern Development of Canada or the Department of the Interior of the United States, or both, as the context requires, which are the respective agencies directly responsible for protection of particular lands in the buffer zone;

(b) "boundary" means the boundary separating the Yukon Territory and the State of Alaska;

(c) "buffer zone" means an area 10 miles in depth at all points on each side of the boundary;

(d) "fire" means a forest fire which is located within or partly within the buffer zone;

(e) "territory" means the land within the buffer zone which may be within the jurisdiction of one or other of the Parties;

(f) "suppression action" means the act of fighting a fire within or partly within the buffer zone.

2. The Parties will co-operate with each other in the detection and suppression of fire by recognizing a buffer zone in which immediate suppression action may be initially started by either Party. In order to facilitate such co-operation the coming into effect of this agreement pursuant to Section 11 hereof shall be construed as permitting officers, employees, agents and conscripts of either Party, when engaged in the detection or suppression of a fire, to pass and repass across the boundary and proceed in the buffer zone without the necessity of obtaining passports, permits, or any other documents whatsoever.

3. Upon the detection of a fire anywhere in the buffer zone, either Party shall have the right to commence immediately suppression action without prior notice to the other. However, when the fire is on the lands of the other Party, the Party which has commenced suppression action will, as soon as practicable thereafter, notify the other Party that a fire has started and that it has intervened to suppress the fire.

4. After having notified the other Party of the detection of a fire on the lands of that Party and of the intervention to suppress the fire, the Party which has commenced such suppression action shall then have discretion whether to continue or to discontinue such action, subject only to giving of notice as provided for in Section 8 hereof.

5. In the event one of the Parties commences suppression action in the buffer zone and notifies the other Party, the other Party may either (a) appoint a liaison officer who shall be charged with observing the progress of the suppression action and reporting on it or (b) actively join the Party which has commenced suppression action and participate in it.

6. Unless otherwise agreed upon between the Parties in a specific case, where a fire is discovered in the buffer zone and both Parties take joint suppression action, the direction of such action shall be under the charge of the Party in whose territory such action is taking place.

7. In accordance with the co-operative nature of this agreement, it shall be permissible and desirable for the Parties to exchange recommendations and suggestions designed to render more effective the detection of fires and the suppression action.

8. Either Party which is engaged in suppression action in the territory of the other Party may discontinue such action at any time upon giving notice of its intention in this respect to the other Party. Both Parties hereby waive all claims or liability which may arise against each other for any loss, damage, injury or death whatsoever resulting from the failure of either Party to institute suppression action or resulting from any discontinuance of suppression action as contemplated by this agreement.

9. Each Party will provide its own men, materials and supplies during suppression action within the buffer zone and will assume its costs, expenses and liabilities in respect of such suppression action without any right of reimbursement whatsoever from the other Party.

10. Each Party hereby undertakes wherever possible, to co-operate in exchanging meteorological information concerning weather, in or about the buffer zone, and to install essential weather recording instruments within 50 miles of the boundary during normal fire seasons.

11. This agreement shall become effective when formalized by an exchange of diplomatic notes between the Government of Canada and the Government of the United States of America.

In witness whereof the undersigned, duly authorized, have signed this agreement.

Done in duplicate at _____ this _____ day of _____ 1970.

For the Department of Indian Affairs and Northern Development of Canada:

JEAN CHRISTIEN,

For the Department of the Interior of the United States of America:

ROGERS C B MORTON.

DEPARTMENT OF JUSTICE,
Washington, D.C., April 24, 1972.

Hon. SAM ERVIN,
*Chairman, Subcommittee on Separation of Powers,
Senate Judiciary Committee,
Washington, D.C.*

DEAR SENATOR ERVIN: This is in response to your letter to Mr. Kleindienst of March 30, 1972 referring to executive agreements and noting that because of the separation of powers problems involved your subcommittee will hold hearings on this matter.

The letter states that government agencies enter into agreements with foreign states and asks for a list of all executive agreements since World War II in which this Department has participated together with the purpose of and authority for the agreements.

It is impossible to be sure, of course, that in the time available we have located every agreement for the 27 year period about which you have asked. In an effort to be as helpful as possible we circulated copies of your letter to the various parts of this Department that seemed most likely to have participated in such agreements. From their responses we have compiled the following list:

1. Agreement between the Bureau of Narcotics and Dangerous Drugs of the Department of Justice and the Office of the Attorney General of Mexico, March 5, 1970. Its purpose is to establish terms by which BNDD provides Mexico with technical and financial assistance to eradicate narcotics and dangerous drugs in Mexico. Section 451(a) of the Foreign Assistance Act of 1961, 22 U.S.C. 2261(a), permits the President to use a contingency fund when he determines its use to be important to the national interest; the funds were allocated by AID to BNDD pursuant to § 632(a) of the Act, 22 U.S.C. 2392(a).

2. Agreement between the French Minister of the Interior and the Attorney General of the United States, February 26, 1971. The purpose of the agreement is to facilitate cooperation between France and the United States in combating illegal drug traffic. For authority see 21 U.S.C. 952, 959, 960; Reorg. Plan No. 1 of 1968, message from President, February 7, 1968, Const., Art. II, § 3.

3. Agreement between the Commissioner, United States Immigration and Naturalization Service and the Director of Immigration of Canada, July 7, 1949. The purpose of the agreement is to provide for the orderly and expeditious return of deportees between Canada and the United States. At the time that the agreement was made the duty of the Attorney General to arrange for deportations was set forth in § 20 of the Immigration Act of 1917, as amended, 39 Stat. 890-91, 57 Stat. 511. The present provision covering this matter is § 243 of the Immigration and Nationality Act, 8 U.S.C. 1253. See also former § 23 of the Immigration Act of 1917, 39 Stat. 892-893, as amended, now superseded by 8 U.S.C. 1103.

4. Migrant Labor Agreement of 1951, as amended between the United States and Mexico. The purpose of the agreement is to establish conditions for the orderly employment of Mexican agricultural workers who may be needed in the

United States. The authority for the agreement is Public Law 78, 82nd Congress, 65 Stat. 119 (1951).

5. The Immigration and Naturalization Service participates in the implementation of agreements made by the State Department with Germany, Belgium, Italy, Greece, Lebanon, Austria, and Hong Kong. The purpose of these agreements is to provide for examination and admission of refugee applicants. The authority for these agreements is § 203(a) (7) of the Immigration and Nationality Act, 8 U.S.C. 1153(a) (7).

We hope that this information is of some assistance to you.

Sincerely,

RALPH E. ERICKSON,
Assistant Attorney General,
Office of Legal Counsel.

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, D.C., April 26, 1972.

HON. SAM J. ERVIN, Jr.,
Committee on the Judiciary,
Subcommittee on Separation of Powers,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of March 30, 1972, requesting information concerning executive agreements in connection with your Committee's inquiry on this subject.

We understand that the Department of State is reporting on agreements entered into by the Government of the United States at the diplomatic level with foreign states during the period from 1946 to the present time. These include the following agreements in relation to which the Department of Labor has been a participating agency:

(1) The Migrant Labor Agreement, August 11, 1951, as amended and extended, replacing the Agreement of August 1, 1949 (TIAS 2331; 2 UST 1940), entered into between the Governments of Mexico and the United States regarding contracting of Mexican Farm Labor. The Agreement specifically provided (Article 2) that all negotiations relating to any aspects of the program which is the subject of this Agreement shall be carried out exclusively between the two Governments. The Agreement gave the Secretary of Labor functions related to carrying out its provisions.

The Agreement was authorized by Public Law 78, 82nd Congress, approved July 12, 1951, 65 Stat. 119, as amended and extended. The Law (which added Title V to the Agricultural Act of 1949), among other things, authorized the Secretary of Labor (Section 507) "(3) when necessary to supplement the domestic agricultural labor force, to cooperate with the Secretary of State in negotiating and carrying out agreements or arrangements relating to the employment in the United States, subject to the immigration laws, of agricultural workers from the Republic of Mexico."

The program terminated under Public Law 78 and the Agreement December 31, 1964 (P.L. 88-203, 77 Stat. 363; TIAS 5492, 14 UST 1804; see also 7 USC 1461, Note (1970 Ed.)).

(2) Agreement amending the Agreement between the Government of Canada and the Government of the United States respecting unemployment insurance benefits, September 11, 1951, TIAS 2452; 3 UST p. 2812. This 1951 Agreement amended the Agreement of April 12, 1942, 56 Stat. 1451, between the two Governments. The purpose of the 1942 Agreement, as stated in the exchange of notes which effected the Agreement, was the coordination and integration of the application of the unemployment insurance laws of Canada and the United States in order to avoid duplication of contributions with respect to the same services and duplication of insurance payments with respect to the same periods of unemployment. The original Agreement named the Social Security Board as the United States agency involved.

In addition to making certain changes in the procedural detail set forth in the original Agreement, the 1951 amendment reflects the fact that the name of the United States agency involved had been changed. (See Reorganization Plan No. 2 of 1949, effective August 20, 1949, 14 FR 5225, 63 Stat. 1065, 5 USC

Appendix, transferring the Bureau of Employment Security to the Department of Labor and transferring to the Secretary of Labor the functions with respect to unemployment insurance, among others.) The Agreement, as amended, is still in effect.

The authorization for the Agreement, as indicated in the exchange of notes in connection with the original Agreement, is the Social Security Act, August 14, 1935, as amended, and the Unemployment Insurance Act, 1940, of Canada.

In regard to agreements at the Departmental level, we submit the following information:

Agreement dated April 21, 1966, entered into between the Department of Labor and the Council for International Economic Cooperation and Development (CIECD) of the Republic of China. This was an Agreement to furnish technical services. It provided for the assignment of Labor Department personnel (a manpower adviser and two other supporting technicians) to assist, on a reimbursable basis, the Manpower Resources Committee of CIECD in examination of potential manpower resources, planning of manpower supply and requirements, and in devising ways to better utilize available manpower resources. The Agreement, as amended, was for a period of approximately 16 months from November 15, 1965, in respect to the manpower adviser and for a lesser period for the other personnel. The Agreement was authorized by an AID determination made (under appropriate delegation to it) pursuant to Section 607 of the Foreign Assistance Act of 1961, as amended (22 USC 2357). Section 607 provides in part that "Whenever the President determines it to be consistent with and in furtherance of the purposes of subchapter I of this chapter and within the limitations of this chapter, any agency of the United States Government is authorized to furnish services and commodities on an advance-of-funds or reimbursement basis to friendly countries. . ."

We trust the above information meets your request, but if there is any other matter in which we can be of further assistance we would be pleased to be so informed.

Sincerely,

J.D. HODGSON,
Secretary of Labor.

THE LIBRARIAN OF CONGRESS,
Washington, D.C. April 10, 1972.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of March 20, 1972 regarding executive agreements. There are two types of executive agreements in which the Library of Congress has participated.

The Department of State from time to time negotiates bilateral executive agreements for the reciprocal exchange of official publications between the United States and foreign countries. Under these agreements the Library of Congress is named as the recipient on behalf of the United States of the official publications received from the foreign countries. Since World War II, the Department of State has negotiated 27 such executive agreements affecting the Library of Congress with the following countries: Austria, Burma, Cambodia, Ceylon, Colombia, Costa Rica, Denmark, Ecuador, Ethiopia, Germany, Greece, India, Indonesia, Israel, Jamaica, Japan, Korea, Norway, Pakistan, Philippines, Spain, Sweden, Switzerland, Thailand, Union of South Africa, Vietnam, Yugoslavia. We enclose an example of this type of executive agreement. They are all identical in content.

In addition, the Library of Congress participates through one of its departments, the Copyright Office, in the administration of the Copyright Law, Title 17 of the U.S. Code. Under this statute, the President of the United States is specifically empowered to issue proclamations extending the provisions of the Copyright Law to the works of authors or proprietors who are citizens or subjects of foreign states or nations under the following conditions:

"§ 9. AUTHORS OR PROPRIETORS, ENTITLED: ALIENS.

*(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to

citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this title may require: *Provided*, That whenever the President shall find that the authors, copyright owners, or proprietors of works first produced or published abroad and subject to copyright or to renewal of copyright under the laws of the United States, including works subject to ad interim copyright, are or may have been temporarily unable to comply with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States, because of the disruption or suspension of facilities essential for such compliance, he may by proclamation grant such extension of time as he may deem appropriate for the fulfillment of such conditions or formalities by authors, copyright owners, or proprietors who are citizens of the United States or who are nationals of countries which accord substantially equal treatment in this respect to authors, copyright owners, or proprietors who are citizens of the United States: *Provided further*, That on liability shall attach under this title for lawful uses made or acts done prior to the effective date of such proclamation in connection with such works, or in respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation, or performance of any such work.

"The President may at any time terminate any proclamation authorized herein or any part thereof or suspend or extend its operation for such period or periods of time as in his judgment the interests of the United States may require."

* * * * *

Pursuant to this statutory authorization, the President has issued proclamations since World War II with respect to the following countries; Australia, Austria, Brazil, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, Monaco, New Zealand, the Philippines, and the United Kingdom. Further details concerning these proclamations are to be found in the enclosed photocopies of a list taken from TREATIES IN FORCE ON JANUARY 1, 1972 and of a table which appeared in the ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1968. We also enclose a copy of the most recent such proclamation.

If we may be of further assistance please let us know.

Sincerely yours,

L. QUINCY MUMFORD,
Librarian of Congress.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.

OFFICE OF THE ADMINISTRATOR,

Washington, D.C., April 10, 1972.

HON. SAM J. ERVIN, JR.

Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your March 30 request, I am enclosing a list of Intergovernmental Executive Agreements, concluded on behalf of the U.S. Government by the Department of State, in which the National Aeronautics and Space Administration has participated. The purpose of each agreement is also shown on the list.

The authority for these agreements rests in the National Aeronautics and Space Act of 1958 which provides, in Section 205, that NASA "may engage in a program of international cooperation in work done pursuant to this Act, and in the peaceful application of the results, thereof, pursuant to agreements made by the President with the advice and consent of the Senate."

On July 29, 1958, at the time the President signed the Act, he stated publicly with reference to section 205, "I regard this section merely as recognizing that international treaties may be made in this field, and as not precluding, in appropriate cases, less formal arrangements for cooperation. To construe the section otherwise would raise substantial Constitutional questions." In the case of each of the agreements shown on the attached list, a determination has been made by the Department of State that submission to the Senate for advice and consent is not required.

We regularly report on and provide copies of agreements, including Memoranda of Understanding and other international arrangements, in which NASA has participated to the Senate Committee on Aeronautical and Space Sciences and to the House Committee on Science and Astronautics.

I trust that you will find this information useful in preparing for your hearings.

Sincerely,

GEORGE M. LOW
(For James C. Fletcher, Administrator).

Country	Agreement	Date	Purpose
Argentina	Tracking stations: Continuation and extension of cooperative program (TIAS 5100).	Mar. 21, 1962	To provide for cooperation in optical tracking.
Australia	Tracking stations (TIAS 4435)	Feb. 26, 1960	To provide for tracking and data stations.
	Tracking stations (TIAS 5291)	Feb. 11, 1963	Do.
	Tracking stations (TIAS 5447)	Oct. 22, 1963	Do.
	Tracking stations (TIAS 5763)	Feb. 10, 1965	Do.
	Tracking stations (TIAS 5934)	Dec. 7, 1965	Do.
	Tracking stations (TIAS 6866)	Mar. 25, 1970	To supersede Feb. 26, 1960, Feb. 11, 1963, Oct. 22, 1963, Feb. 10, 1965, and Dec. 7, 1965 agreements.
	Space Research Program (TIAS 6897)	May 22, 1970	To provide for sounding rocket project.
Brazil	Experimental communications satellites (TIAS 4917)	Oct. 27, 1961	To provide for testing of experimental communications satellites.
	Earth resources (TIAS 6569)	Sept. 10, 1968	To provide for Brazilian participation in remote sensing project.
	Earth resources (TIAS 7060)	Feb. 3, 1971	To provide for extension of Sept. 10, 1968 agreement.
Canada	Joint upper atmosphere research facilities at Fort Churchill, Manitoba (TIAS 4524).	June 14, 1960	To provide for sounding rocket projects.
	Tracking stations (TIAS 4564)	Aug. 24, 1960	To provide tracking and data station.
	Meteorological satellite system (TIAS 5260).	Dec. 28, 1962	To provide station for meteorological satellite system.
	Experimental communications satellites (TIAS 5474).	Aug. 23, 1963	To provide for testing of experimental communications satellites.
	Ionospheric research by satellites (TIAS 5575).	May 6, 1964	To provide for cooperative ionospheric satellite projects.
	Joint upper atmosphere research facilities at Fort Churchill, Manitoba (TIAS 5819).	June 11, 1965	To supersede June 14, 1960 agreement.
	Cooperative study of the Polar Cap ionosphere (TIAS 6324).	Aug. 11, 1967	To provide for sounding rocket project.
	Aeronautical research (TIAS 6982)	Nov. 10, 1970	To provide for the augmentor wing flight test program.
	Scientific cooperation (TIAS 7024)	Dec. 18, 1970	To provide for sounding for rocket projects
	Remote sensing (TIAS 7125)	May 14, 1971	To provide for Canadian participation in remote sensing project.
	Tracking stations (TIAS 7281)	Feb. 23, 1972	To provide tracking and data station.
Chile	Tracking stations (TIAS 4216)	Feb. 19, 1959	To provide for tracking and data station.
Denmark	Experimental communications satellites (TIAS 5431).	Sept. 14, 1963	To provide for testing of experimental communications satellites.
Ecuador	Tracking stations (TIAS 4429)	Feb. 24, 1960	To provide for tracking and data station.
	Tracking stations (TIAS 5799)	May 10, 1965	To provide for extension of Feb. 24, 1960 agreement.
European Space Research Organization (ESRO).	Satellite telemetry/telecommand station near Fairbanks, Alaska (TIAS 6160).	Nov. 28, 1966	To provide for ESRO tracking and data station in Alaska.
	Satellite telemetry/telecommand station near Fairbanks, Alaska (TIAS 7280).	Feb. 23, 1972	To provide for extension of Nov. 28, 1966 agreement.

INTERGOVERNMENTAL EXECUTIVE AGREEMENTS

Country	Agreement	Date	Purpose
France.....	Experimental communications satellites (TIAS 4738).	Mar. 31, 1961	To provide for testing of experimental communications satellites.
	Satellite-balloon meteorological research (TIAS 6069).	June 24, 1966	To provide for cooperative meteorological satellite-balloon project (Project EOLE)
Germany.....	Experimental communications satellites (TIAS 4885).	Sept. 29, 1961	To provide for testing of experimental communications satellites.
Italy.....	Outer space cooperation (TIAS 5172)....	Sept. 5, 1962	To provide for cooperative space science satellite projects.
	Experimental communications satellites (TIAS 5211).	Nov. 14, 1962	To provide for testing of experimental communications satellites.
	Launching of NASA satellites from San Marco Range (TIAS 6809).	June 12, 1969	To provide for launching of NASA satellites from San Marco range.
	Cooperative satellite research project (TIAS 6810).	Sept. 11, 1969	To provide for cooperative space science satellite project.
	Launching services for Italian satellites (TIAS 6903).	June 20, 1970	To provide for launching of Italian satellites from NASA facilities.
Japan.....	Experimental communications satellites (TIAS 5212).	Nov. 6, 1962	To provide for testing of experimental communications satellites.
Malagasy Republic.	Tracking stations (TIAS 6024).....	May 2, 1966	To provide for tracking and data station.
	Tracking stations (TIAS 7213).....	Sept. 16, 1971	To extend and amend May 2, 1966, agreement.
Mexico.....	Tracking stations (TIAS 4466).....	Apr. 12, 1960	To provide for tracking and data station.
	Tracking stations (TIAS 5372).....	May 16, 1963	To extend and amend Apr. 12, 1960 agreement.
	Tracking stations (TIAS 5755).....	Jan. 27, 1965	To extend Apr. 12, 1960, agreement as extended and amended.
	Tracking and communications stations (TIAS 5775).	Feb. 27, 1965	To provide for continuation and expanded use of station at Enpalme-Guaymas Sonora.
	Space research programs (TIAS 5783) ..	Feb. 27, 1965	To provide for Mexican participation in meteorological rocket program, establishment of an APT station, and participation in remote sensing project.
	Earth resources (TIAS 6613)	Dec. 20, 1968	To provide for Mexican participation in earth resources survey project.
Nigeria.....	Tracking stations (TIAS 4605).....	Oct. 19, 1960	To provide for tracking and data station.
	Tracking stations (TIAS 5661)	May 21, 1964	To amend and extend Oct. 19, 1960 agreement.
Norway.....	Experimental communications satellites (TIAS 5431).	Sept. 14, 1963	To provide for testing of experimental communications satellites.
South Africa	Tracking stations (TIAS 4562)	Sept. 13, 1960	To provide for tracking and data stations.
Spain.....	Tracking stations (TIAS 4463)	Mar. 18, 1960	To provide for tracking and data station.
	Tracking stations (TIAS 5393)	June 28, 1963	To extend and amend Mar. 17, 1960 agreement.
	Tracking stations (TIAS 5533)	Jan. 29, 1964	To provide for tracking and data station
	Experimental communications satellites (TIAS 5761).	Jan. 26, 1965	To provide for testing of experimental communications satellites.
	Tracking stations (TIAS 5896)	Oct. 11, 1965	To interpret Jan. 29, 1964 agreement.
	Tracking stations (TIAS 6003)	Apr. 14, 1966	To provide for tracking and data station.
	Space research (TIAS 5992)	Apr. 14, 1966	To provide for sounding rocket project.
	Tracking stations (TIAS 6714)	June 25, 1969	To provide for extension of Jan. 29, 1964 agreement
Sweden.....	Experimental communications satellites (TIAS 5431)	Sept. 14, 1963	To provide for testing of experimental communications satellites.
United Kingdom..	Tracking and communications station on the island of Zanzibar (TIAS 4688).	Oct. 14, 1960	To provide for tracking and data station.
	Tracking stations (TIAS 4679)	Jan. 20, 1961	Do.
	Tracking station on Island of Bermuda (TIAS 4701).	Mar. 15, 1961	Do.
	Tracking station on Canton island (TIAS 4718).	Apr. 6, 1961	Do.
	Experimental communications satellites (TIAS 4704).	Apr. 29, 1961	To provide for testing of experimental communications satellites.
	Space research programs (TIAS 4840) ..	Sept. 8, 1961	To provide for cooperative satellite projects.
	Tracking station on Canton Island (TIAS 5438) ..	Sept. 23, 1963	To extend and modify Apr. 6, 1961 agreement.
	Tracking station on Bermuda (TIAS 5434).	Sept. 23, 1963	To amend and extend Mar. 15, 1961 agreement.
	Tracking station on Ascension Island (TIAS 5864).	July 7, 1965	To provide for tracking and data station.
	Tracking stations (TIAS 6208)	Jan. 1, 1967	Do.
	Tracking station on Antigua (TIAS 6207).	Jan. 23, 1967	Do.
	Tracking station on Bermuda (TIAS 6450).	Jan. 17, 1969	To modify Mar. 15, 1961 agreement as modified.
	Tracking station on Grand Bahama (TIAS 6485).	May 3, 1968	To provide for tracking and data station.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES,

Washington, D.C., April 5, 1972.

Hon. SAM J. ERVIN, JR.

Chairman, Subcommittee on Separation of Powers, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: We are happy to respond to your letter of March 30, in which you requested a list of all executive agreements with foreign states entered into by this agency.

The National Foundation on the Arts and the Humanities has entered into no agreements of any nature with a foreign state—nor do we anticipate doing so in the foreseeable future.

Sincerely,

P. P. BERMA.

Director of Administration.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF EMERGENCY PREPAREDNESS,

Washington, D.C., April 13, 1972.

Hon. SAM J. ERVIN, JR.,

Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: This is in response to your inquiry of March 30, 1972, concerning executive agreements between U.S. government agencies and foreign states.

The Office of Emergency Preparedness has not entered into such agreements with any foreign state or agencies of a foreign state. However, OEP initiated the drafting and participated in the negotiation of the following government-to-government agreements:

Agreement Between the United States and Canada on Civil Emergency Planning (effected by Exchange of Notes signed at Ottawa, August 8, 1967—TIAS 6325);

Agreement Between the United States of America and Mexico on Disaster Assistance (effected by Exchange of Notes signed at Washington, May 3, 1968—TIAS 6481).

If the Subcommittee on Separation of Powers wishes amplifying details concerning OEP's activities resulting from these agreements, we are prepared to provide them at your convenience.

Sincerely,

G. A. LINCOLN, *Director.*

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,

Washington, D.C., April 8, 1972.

Hon. SAM J. ERVIN, JR.,

Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of March 30, 1972, in which you request a list of executive agreements in which the Office of Management and Budget has participated since World War II.

The Office of Management and Budget (and its predecessor agency, the Bureau of the Budget) has not entered into any executive agreements since World War II.

Sincerely,

FRANK C. CARLUCCI,

*Associate Director**(For Director).*

OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., April 7, 1972.

HON. SAM J. ERWIN, JR.,
Chairman, Subcommittee on Separation of Powers,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: This is in response to your letter of March 30, 1972, requesting a list of the executive agreements in which this Office has participated since its organization in 1963.

Over the years this Office has been involved in interagency discussions with respect to the substantive content of certain executive agreements which are not included in the enclosed list. The enclosed list includes only those executive agreements in the negotiation and conclusion of which this Office participated.

In addition to executive agreements described in the enclosed list, this Office has from time to time participated in discussions and negotiations under Articles XIX and XXVIII of the General Agreement on Tariffs and Trade (GATT) with respect to tariff compensation owed to the United States or owed by the United States to foreign countries as a result of emergency action on imports of schedules. Changes in GATT schedules resulting from such negotiations are recorded in certifications relating to rectifications and modifications of the GATT schedules, which are published in Treaties and Other International Acts Series ("TIAS").

Finally, mention should be made of the 1967 Agreement relating principally to Chemicals, supplementary to the Geneva (1967) Protocol to the GATT, and an Agreement concluded in 1967 between the United States and Japan relating to certain canned clams and wool knit gloves. These agreements were negotiated on an *ad referendum* basis and they have not been implemented by Congress. Therefore, they are not included in the attached list of executive agreements.

Let me assure you of our willingness to cooperate with your Committee to the fullest possible extent. To this end, please let me know if we can supply any additional information.

Sincerely,

W. D. EBERLE,
Special Representative.

OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., April 7, 1972.

EXECUTIVE AGREEMENTS IN WHICH THIS OFFICE PARTICIPATED, 1963-1972

1. Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, 1965 (regarding the less-developed contrasting parties) (TIAS 6139)

Authority: Title II of the Trade Expansion Act of 1962, (P.L. 87-794, October 11, 1962, 76 Stat. 872)

2. Geneva (1967) Protocol to the General Agreement on Tariffs and Trade, 1967 (the "Kennedy Round" of tariff negotiations) (TIAS 6425)

Authority: Title II of the Trade Expansion Act of 1962, (P.L. 87-794, October 11, 1962, 76 Stat. 872)

3. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1967 (the "International Antidumping Code") (TIAS 6431)

Authority: U.S. Constitution, Art. II, Sec. 1 ("executive Power")

4. Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement, 1967

Authority: U.S. Constitution, Art. II, Sec. 1 ("executive Power"). A subsequent treaty on the same subject matter, the International Grains Arrangement of 1967, received the advice and consent of the Senate on June 13, 1968.

5. 1967 and 1970 Extensions of the Long-Term Arrangement Regarding International Trade in Cotton Textiles (TIAS 6289 and 6940)

Authority: Section 204 of the Agricultural Act of 1956, as amended (P.L. 84-540, May 28, 1956, 70 Stat. 200; P.L. 87-488, June 19, 1962, 76 Stat. 104)

6. Agreement relating to Trade in Cereals Between the United States and the United Kingdom, 1971 (TIAS 7165)

Authority: U.S. Constitution, Art. II, Sec. 1 ("executive Power")

7. Agreement relating to Trade in Strawberries Between the United States and Mexico, 1972

Authority: Section 204 of the Agricultural Act of 1956, as amended (P.L. 84-540, May 28, 1956, 70 Stat. 200; P.L. 87-488, June 19, 1962, 76 Stat. 104)

8. Several bilateral agreements to provide tariff concessions as compensation for incidental tariff changes resulting from promulgation of the Tariff Schedules of the United States in 1963

Authority: Tariff Classification Act of 1962 (P.L. 87-456, May 24, 1962, 76 Stat. 721); and Title II of the Trade Expansion Act of 1962 (P.L. 87-794, October 11, 1962, 76 Stat. 872)

9. Several Protocols for the accession and provisional accession of various countries to the General Agreement on Tariffs and Trade, including the United Arab Republic, Spain, Argentina, Iceland, Swiss Confederation, Yugoslavia, Tunisia, Korea, Ireland, Poland, Congo-Kinshasa, Romania and Mauritius

Authority: U.S. Constitution, Art. II, Sec. 1 ("executive Power"); Title II of the Trade Expansion Act of 1962 (P.L. 87-794, October 11, 1962, 76 Stat. 872)

OVERSEAS PRIVATE INVESTMENT CORPORATION.

OFFICE OF THE PRESIDENT,
Washington, D.C., April 6, 1972.

Hon. SAM J. ERVIN, JR.,
Committee on the Judiciary,
Subcommittee on Separation of Powers,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: In answer to your request of March 30, OPIC has concluded no executive agreements since our incorporation as a separate government agency on January 19, 1971. It has, however, inherited 161 "investment guaranty agreements" covering our investment incentives programs, which have been concluded by the U.S. Government from the inception of these programs in 1948.

These programs, administered by OPIC since its creation provide incentives to U.S. private investment in countries whose economic growth is important to U.S. national interest. The insurance protects against inconvertibility of currency, expropriation and war, revolution or insurrection, while guaranties apply to all risks on the portion of investment covered.

Although these agreements have changed in form over the 24-year period, they generally provide that the host government agrees to the operation of the U.S. program, limited to investments approved by the host government, and—

1. in case of payment by the program of a claim, the host government recognizes the subrogation of the U.S. agency (now OPIC) to the rights of the insured investor as well as to any currency or assets;

2. In case of dispute over a subrogated right, to submit the dispute to third party arbitration.

In some early agreements, which provided only for insurance against loss due to inconvertibility, there is no arbitration provision. In some later agreements, the U.S. Government has agreed to exhaust local remedies (in local

courts) prior to the submission of a claim to intergovernmental negotiation and arbitration. However, the agreements specifically preserve the right to the U.S. Government to espouse a claim as a sovereign.

A draft form note typical of these agreements is enclosed, along with a list of the 161 existing investment guaranty agreements which were concluded while the programs were being administered by AID and its predecessor agencies.

The requirement for these agreements may be found in the Foreign Assistance Act of 1961, as amended, Section 237(a) as follows:

Section 237: GENERAL PROVISIONS RELATING TO INSURANCE AND GUARANTY PROGRAMS: (a) Insurance and guaranties issued under this title shall cover investment made in connection with projects in any less developed friendly country or area with the government of which the President of the United States has agreed to institute a program for insurance or guaranties.

All agreements which are still in full force and effect have been published by the U.S. Government and are available by number in the TIAS series from the U.S. Government Printing Office.

I hope this information meets the needs of your Subcommittee.

Sincerely yours,

BRADFORD MILLS.

DRAFT NOTE INVESTMENT GUARANTY AGREEMENT

EXCHANGE OF NOTES

EXCELLENCY: I have the honor to refer to conversations which have recently taken place between representatives of our two governments relating to investments in (Country) which further the development of the economic resources and productive capacities of (Country) and to guaranties of such investments by the Government of the United States of America. I also have the honor to confirm the following understandings reached as a result of those conversations:

1. When nationals of the Government of the United States of America [the Guaranteeing Government] propose to invest with the assistance of guaranties issued pursuant to this Agreement in a project or activity within the territorial jurisdiction of the Government of (Country) [the Host Government], the two Governments shall, upon the request of either, consult respecting the nature of the project or activity and its contribution to economic and social development in (Country).

2. The procedures set forth in this Agreement shall apply only with respect to guaranteed investments in projects or activities approved by the Host Government.

3. If the Guaranteeing Government makes payment to any investor under a guaranty issued pursuant to the present Agreement, the Host Government shall, subject to the provisions of the following paragraph, recognize the transfer to the Guaranteeing Government of any currency, credits, assets, or investment on account of which payment under such guaranty is made as well as the succession of the Guaranteeing Government to any right, title, claim, privilege, or cause of action existing, or which may arise, in connection therewith.

4. To the extent that the laws of the Host Government partially or wholly invalidate the acquisition of any interests in any property within its national territory by the Guaranteeing Government, the Host Government shall permit such investor and the Guaranteeing Government to make appropriate arrangements pursuant to which such interests are transferred to an entity permitted to own such interests under the laws of the Host Government. The Guaranteeing Government shall assert no greater rights than those of the transferring investor under the laws of the Host Government with respect to any interests

transferred or succeeded to as contemplated in paragraph 3. The Guaranteeing Government does, however, reserve its rights to assert a claim in its sovereign capacity in the eventuality of a denial of justice or other question of state responsibility as defined in international law.

5. Amounts in the lawful currency of the Host Government and credits thereof acquired by the Guaranteeing Government under such guaranties shall be accorded treatment neither less nor more favorable than that accorded to funds of nationals of the Guaranteeing Government deriving from investment activities like those in which the investor has been engaged, and such amounts and credits shall be freely available to the Guaranteeing Government to meet its expenditures in the national territory of the Host Government.

6. (a) Differences between the two Governments concerning the interpretation of the provisions of this Agreement shall be settled, insofar as possible, through negotiations between the two Governments. If such a difference cannot be resolved within a period of three months following the request for such negotiations, it shall be submitted, at the request of either Government, to an ad hoc arbitral tribunal for settlement in accordance with the applicable principles and rules of public international law. The arbitral tribunal shall be established as follows: Each Government shall appoint one arbitrator; these two arbitrators shall designate a President by common agreement who shall be a citizen of a third State and be appointed by the two Governments. The arbitrators shall be appointed within two months and the President within three months of the date of receipt of either Government's request for arbitration. If the foregoing time limits are not met, either Government may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointment or appointments, and both Governments agree to accept such appointment or appointments. The arbitral tribunal shall decide by majority vote. Its decision shall be binding. Each of the Governments shall pay the expense of its member and its representation in the proceedings before the arbitral tribunal; the expenses of the President and the other costs shall be paid in equal parts by the two Governments. The arbitral tribunal may adopt other regulations concerning the costs. In all other matters, the arbitral tribunal shall regulate its own procedures.

(b) Any claim, arising out of investments guaranteed in accordance with this Agreement, against either of the two Governments, which, in the opinion of the other, presents a question of public international law shall, at the request of the Government presenting the claim, be submitted to negotiations. If at the end of three months following the request for negotiations the two Governments have not resolved the claim by mutual agreement, the claim, including the question of whether it presents a question of public international law, shall be submitted for settlement to an arbitral tribunal selected in accordance with paragraph (a) above. The arbitral tribunal shall base its decision exclusively on the applicable principles and rules of public international law. Only the respective Governments may request the arbitral procedure and participate in it.

7. This Agreement shall continue in force until six months from the date of receipt of a note by which one Government informs the other of an intent no longer to be a party to the Agreement. In such event, the provisions of the Agreement with respect to guaranties issued while the Agreement was in force shall remain in force for the duration of those guaranties, in no case longer than twenty years, after the denunciation of the agreement.

8. This Agreement shall enter into force on the date of the note by which the Host Government communicates to the Guaranteeing Government that the Agreement has been approved in conformity with the Host Government's constitutional procedures.

Upon receipt of a note from Your Excellency indicating that the foregoing provisions are acceptable to the Government of (Country), the Government of the United States of America will consider that this note and your reply thereto constitute an Agreement between our two Governments on this subject, the Agreement to enter into force in accordance with paragraph 8 above.

Accept, Excellency, the renewed assurances of my highest consideration.

/s/-----

OVERSEAS PRIVATE INVESTMENT CORPORATION

[An Agency of the U.S. Government, Washington, D.C.]

CHRONOLOGICAL LIST OF INVESTMENT GUARANTY AGREEMENTS AND AMENDMENTS,¹ 1948 TO 1972

[As of April 3, 1972]

Year	Chronological entry into investment guaranty program	Date ²	Country	Type of investment guaranties covered
1948	The Foreign Assistance Act of 1948 (Public Law 472-80th Cong.) initiated the investment guaranty program and authorized the issuance of investment guaranties of convertibility of receipts from investments in countries participating in the Marshall Plan which had agreed with the U.S.A. to institute the program. Convertibility agreements were concluded as article III of the standard Economic Cooperation Agreements with countries participating in the Marshall Plan.			
	1	June 28	Italy	Convertibility.
	2	June 28	France	Do.
	3	June 29	Denmark	Do.
	4	July 2	Netherlands	Do.
	5	July 2	Austria	Do.
	6	July 2	Greece	Do.
	7	July 2	Belgium	Do.
	8	July 3	Norway	Do.
	9	July 3	Luxembourg	Do.
	10	July 4	Turkey	Do.
	11	July 6	United Kingdom	Do.
	12	Sept. 28	Portugal	Do.
1949	13	Dec. 15	Germany	Do.
1950	No new agreements concluded. The Economic Cooperation Act of 1950 (Public Law 535, title I, 81st Cong.) expanded the guaranty authority by authorizing guaranties against loss by reason of expropriation or confiscation by action of the government of a participating country. Convertibility understandings in effect (see above) had to be amended to cover expropriation guaranties.			
1951	The Mutual Security Act of 1951 (Public Law 165-82d Cong.) extended the investment guaranty program to any area in which assistance was authorized by the Mutual Security Act; thus to the Middle East, Africa, the Far East, and Latin America.			
		April 27	Germany	Amendment. Expropriation.
		Nov. 15	Turkey	Amendment. Convertibility and expropriation.
		Dec. 28	Italy	Amendment. Expropriation.
1952	14	Jan. 8	Yugoslavia	Convertibility.
		Feb. 16	Austria	Amendment. Expropriation.
	15	Feb. 19	Philippines	Convertibility and expropriation.
		April 1	Norway	Amendment. Expropriation.
		April 23	Greece	Do.
		May 12	Belgium	Do.
	16	June 25	China (Republic of)	Convertibility and expropriation.
		July 22	France	Amendment. Expropriation.
	17	Aug. 8	Israel	Convertibility and expropriation.
		Aug. 8	Denmark	Amendment. Expropriation.
		Aug. 15	Yugoslavia	Do.
		Oct. 7	Netherlands	Do.
1953	The Mutual Security Act of 1953 (Public Law 118-83rd Cong.) expanded the guaranty authority by providing that guaranties shall be available for investments " * * * in any country with which the United States has agreed to institute the guaranty program."			
	18	April 2	Haiti	Convertibility and expropriation.
		May 25	Portugal	Amendment. Expropriation.
	19	Sept. 26	Spain	Convertibility and expropriation.
1954	The Mutual Security Act of 1954 (Public Law 665-83rd Cong.), to be amended, was the legislative authority for the investment guaranty program from 1954 until September 1961.			
	20	March 8	Japan	Convertibility and expropriation.
	21	Sept. 1	Thailand	Do.
1955	22	Feb. 25	Costa Rica	Do.
	23	Mar. 16	Peru	Do.
	24	Mar. 23	Guatemala ³	Do.
	25	Mar. 29	Ecuador	Do.
	26	May 26	Pakistan	Do.
	27	June 10	Honduras	Do.
	28	Sept. 23	Bolivia	Do.
	29	Oct. 5	Ireland	Do.
	30	Oct. 28	Paraguay	Do.
	31	Nov. 18	Colombia ⁴	Do.

See footnotes at end of table.

OVERSEAS PRIVATE INVESTMENT CORPORATION—Continued

[An Agency of the U.S. Government, Washington, D.C.]

CHRONOLOGICAL LIST OF INVESTMENT GUARANTY AGREEMENTS AND AMENDMENTS, ¹ 1948 TO 1972—Con.

[As of April 3, 1972]

Year	Chronological entry into investment guaranty program	Date ²	Country	Type of investment guaranties covered	
1956	The Mutual Security Act of 1956 (Public Law 726-84th Cong.), amending the Mutual Security Act of 1954, added guaranty coverage for losses incurred by reason of war ("war risk"). Convertibility and/or expropriation agreements in effect (see above) had to be amended to cover war risk guaranties.				
	32	Sept. 24	Jordan	Convertibility and expropriation.	
		Dec. 7	Luxembourg	Amendment. Expropriation.	
1957		Jan. 15	Turkey	Amendment. Expropriation.	
	33	Feb. 4	Cuba	Convertibility and expropriation.	
		May 3	China, Republic ⁵	Amendment. War risk.	
	34	June 9	Afghanistan	Convertibility; expropriation; war risk.	
		Aug. 11	Israel	Amendment. War risk.	
		Aug. 27	Thailand	Do.	
	35	Sept. 19	India	Convertibility.	
	36	Sept. 21	Iran	Convertibility and expropriation.	
		Oct. 18	Italy	Amendment. War risk.	
	37	Nov. 5	Viet Nam	Convertibility; expropriation; war risk.	
1958		Feb. 22	Jordan	Amendment. War risk.	
	38	Sept. 30	Ghana	Convertibility, expropriation.	
		Oct. 23	Austria	Amendment. War risk.	
1959		39	Mar. 17	Sudan ⁶	Convertibility, expropriation, war risk.
		40	Mar. 18	Tunisia	Do.
		41	Apr. 14	Nicaragua	Do.
		42	Apr. 21	Malaya	Convertibility, expropriation.
		43	July 22	Finland	Convertibility, expropriation, war risk.
		Dec. 7	India	Amendment. Expropriation.	
		44	Dec. 22	Argentina	Convertibility.
1960		45	Jan. 29	El Salvador	Convertibility and expropriation.
		46	Feb. 19	Korea	Convertibility, expropriation and war risk.
		47	May 17	Nepal	Do.
		48	July 29	Chile	Convertibility.
	Revised	Aug. 9	Guatemala	Convertibility, expropriation.	
		49	Sept. 12	Liberia	Convertibility, expropriation and war risk.
1961		50	Jan. 23	Panama	Convertibility, expropriation, war risk.
		51	Mar. 31	Morocco	Do.
		52	May 19	Sierra-Leone	Do.
		53	Sept. 6	Uruguay ⁷	Convertibility, expropriation.
On September 4, 1961, the Foreign Assistance Act of 1961 was enacted (Public Law 87-195). The specific risk guaranties authorized by part I, ch. 2, title III, were expanded to include guaranties against loss due to revolution or insurrection as well as war. Extended risk guaranties were also authorized. The investment guaranty authority was administered by the Agency for International Development after November 4, 1961.					
	54	Dec. 1	Ivory Coast	Convertibility; expropriation; war, revolution or insurrection; extended risk.	
1962		55	Mar. 20	Togo	Convertibility; expropriation; war, revolution or insurrection; extended risk.
		56	Apr. 26	Niger	Do.
		57	May 2	Dominican Republic	Do.
		58	May 9	Guinea	Do.
		59	Aug. 3	Ethiopia	Convertibility and expropriation.
		60	Sept. 1	Congo (Brazzaville)	Convertibility and expropriation; war, revolution or insurrection; extended risk.
	Revised	Oct. 5	Colombia ⁸	Do.	
	⁹ 61	Nov. 17	Congo (Kinshasa)	Do.	
		62	Nov. 29	Venezuela	Do.
		63	Dec. 24	Nigeria	Convertibility and expropriation.

See footnotes at end of table.

OVERSEAS PRIVATE INVESTMENT CORPORATION—Continued

[An Agency of the U.S. Government, Washington, D.C.]

CHRONOLOGICAL LIST OF INVESTMENT GUARANTY AGREEMENTS AND AMENDMENTS, ¹ 1948 TO 1972—Con.

[As of April 3, 1972]

Year	Chronological entry into investment guaranty program	Date ²	Country	Type of investment guaranties covered
1963	64	Jan. 4	Jamaica	Convertibility; expropriation; war, revolution or insurrection; extended risk.
	65	Jan. 15	Trinidad-Tobago	Do.
		Feb. 20	Israel	Amendment. Revolution or insurrection; extended risk.
		Mar. 6	Tunisia	Do.
	66	Apr. 10	Gabon	Convertibility; expropriation; war, revolution or insurrection; extended risk.
		Apr. 19	Greece	Amendment. War, revolution or insurrection; extended risk.
	67	May 29	Cyprus	Convertibility; expropriation; war, revolution or insurrection; extended risk.
		June 4	Nepal	Amendment. Revolution or insurrection; extended risk.
		June 5	Argentina ¹⁰	Amendment. Expropriation; war, revolution or insurrection; extended risk.
	68	June 12	Senegal ¹⁰	Convertibility; expropriation; war, revolution or insurrection; extended risk.
		June 25	Jordan	Amendment. Revolution or insurrection; extended risk.
	69	June 29	U.A.R. (Egypt)	Convertibility; expropriation; war, revolution or insurrection; extended risk.
	70	July 26	Malagasy Republic	Do.
		Aug. 8	Viet Nam	Amendment. Revolution or insurrection; extended risk.
		Sep. 4	Ecuador	Amendment. War, revolution or insurrection; extended risk.
		Oct. 2	Morocco	Amendment. Revolution or insurrection; extended risk.
		Nov. 13	Sierra Leone	Do.
	71	Nov. 14	Tanzania	Convertibility; expropriation; war, revolution or insurrection; extended risk.
		Dec. 3	Chile ¹⁰	Amendment. Expropriation; war, revolution or insurrection; extended risk.
		Dec. 30	China, Republic of (Taiwan)	Do.
1964	72	Jan. 8	Somali Republic	Convertibility; expropriation; war, revolution or insurrection; Extended risk.
		Mar. 2	Sudan	Amendment. War, revolution or insurrection; extended risk.
		Mar. 4	Bolivia	Do.
	73	Apr. 20	Kenya	Convertibility; expropriation; war, revolution or insurrection; extended risk.
		June 9	Mali	Do.
	74	June 9	Mali	Do.
	75	July 3	Mauritania	Do.
		Sept. 29	Liberia ¹¹	Amendment. War, revolution or insurrection; extended risk.
		Nov. 27	Turkey	Do.
	76	Dec. 9	Laos	Convertibility; expropriation; war, revolution or insurrection; extended risk.
1965	77	Dec. 31	Central African Rep.	Do.
	78	Feb. 6	Brazil	Do.
	79	Mar. 13	Dahomey	Do.
	Revised	Apr. 9	Costa Rica ¹²	Revision. Convertibility; expropriation; war, revolution or insurrection; extended risk.
	Amended	Apr. 16	Korea	Amendment. Revolution or insurrection; extended risk.
	80	May 12	Chad	Convertibility; expropriation; war, revolution or insurrection; extended risk.
	81	May 29	Uganda	Do.
	82	May 29	British Guiana	Do.
	83	June 18	Upper Volta	Do.
	Amended	June 24	Malaysia ¹³	Amendment. War, revolution or insurrection; extended risk.
	84	Aug. 9	Rwanda	Convertibility; expropriation; war, revolution or insurrection; extended risk.
	Amended	Dec. 22	Thailand ¹⁴	Amendment. War, revolution or insurrection; extended risk.

See footnotes at end of table.

OVERSEAS PRIVATE INVESTMENT CORPORATION—Continued

[An Agency of the U.S. Government, Washington, D.C.]

CHRONOLOGICAL LIST OF INVESTMENT GUARANTY AGREEMENTS AND AMENDMENTS,¹ 1948 TO 1972—Cont
[As of April 3, 1972]

Year	Chronological entry into investment guaranty program	Date ²	Country	Type of investment guaranties covered
1966	Amended	Feb. 2	India.....	Amendment. War, revolution or insurrection; extended risk.
		85 Feb. 8	British Honduras.....	Convertibility; expropriation; war, revolution or insurrection; extended risk.
		86 Feb. 23	Ceylon.....	Do.
		87 Mar. 25	Singapore.....	Do.
	Amended	Apr. 30	Honduras.....	Amendment. War, revolution or insurrection; extended risk.
	Amended	May 9	Nicaragua.....	Amendment. Revolution or insurrection; extended risk.
	Amended	Aug. 11	Paraguay.....	Amendment. War, revolution or insurrection; extended risk.
		88 Aug. 11	Zambia.....	Convertibility; expropriation; war, revolution or insurrection; extended risk.
	Amended	Aug. 15	Philippines.....	Amendment. War, revolution or insurrection; extended risk.
		89 Nov. 16	Malta.....	Convertibility; expropriation; war, revolution or insurrection; extended risk.
1967		90 Jan. 7	Indonesia.....	Do.
		91 Feb. 24	Lesotho.....	Do.
	Amended	Mar. 3	Ghana.....	Amendment. War, revolution or insurrection; extended risk.
		92 Mar. 7	Cameroon.....	Convertibility; expropriation; war, revolution or insurrection; extended risk.
		93 July 21	Malawi.....	Do.
		94 Sept. 29	Swaziland.....	Do.
1968		95 Nov. 6	Gambia.....	Do.
		96 Jan. 12	Botswana.....	Convertibility; expropriation, war, revolution or insurrection; extended risk.
	Amended	Mar. 8	Ethiopia.....	Amendment. War, revolution or insurrection; extended risk.
		97 Mar. 11	Barbados.....	Convertibility; expropriation, war, revolution or insurrection; extended risk.
	Amended	Mar. 27	Pakistan.....	Amendment. War, revolution or insurrection; extended risk.
		98 June 27	Grenada.....	Convertibility; expropriation, war, revolution or insurrection; extended risk.
		99 Aug. 9	St. Lucia.....	Do.
		100 Oct. 9	Antigua.....	Do.
		101 Oct. 11	Dominica.....	Do.
		102 Nov. 21	St. Christopher-Nevis-Ang.....	Do.
	Revised	Nov. 22	Costa Rica.....	Do.
	Revised	Apr. 28	El Salvador.....	Do.
		103 May 6	Burundi.....	Do.
		104 July 22	Western Samoa.....	Do.
1970	Amended	Feb. 12	Viet Nam.....	Amendment. Abrogation of war risk only understandings of previous agreement.
	Amended	Mar. 12	Iran.....	Amendment. War, revolution or insurrection; extended risk.
		105 May 11	Mauritius.....	Convertibility; expropriation; war, revolution or insurrection; extended risk.
	Amended	Dec. 1	Haiti.....	Amendment. War, revolution or insurrection; extended risk.
1971	None.			
1972	None; as of April 3, 1972.			

¹ Under subsequent legislation, the investment guaranty agreements now enable both investment insurance and investment guaranty programs administered by OPIIC.

² Date quoted is date of signature of agreement or date of agreeing government's note in reply in exchange of notes comprising agreement. Date of entry into effect not given. (Except as noted, all agreements, as amended, are in full force and effect.)

³ Terminated and replaced by Agreement of Aug. 9, 1960.

⁴ Terminated and replaced by Agreement of Oct. 1962.

⁵ Terminated and replaced by Amendment of Dec. 30, 1963.

⁶ War risk Article terminated and replaced by Amendment of Mar. 2, 1964.

⁷ Agreement has not been ratified and is not in effect; guaranties may not yet be issued in Uruguay.

⁸ Interim agreement. To be superseded by full investment guaranty agreement signed Dec. 2, 1963, to be ratified (not yet in effect).

⁹ Formerly Leopoldville.

¹⁰ Agreements have not been ratified and are not in full force and effect; guaranties may be issued under agreement during interim period on basis agreement in force provisionally.

¹¹ Present amendment terminates and replaces old war risk understandings.

¹² Revised agreement when ratified and in force, will terminate and replace old 1955 convertibility and expropriation understandings.

¹³ Malaysia agreement extended coverages of 1953 Malaya IGA to Sarawak, Sabah (formerly North Borneo), and Singapore (since Seceded) as well as Malaya.

¹⁴ Present amendment terminates and replaces amendment for war risk only of Aug. 27, 1957.

UNITED STATES POSTAL SERVICE
OFFICE OF THE EXECUTIVE ASSISTANT TO THE POSTMASTER GENERAL,
Washington, D.C.

HON. SAM J. ERVIN, JR.,

Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to the request made in your letter of March 30, 1972.

Postal arrangements with other countries are made for the purpose of developing and improving communications between this Nation and the other Nations of the world, of furthering international collaboration in the cultural, social and economic fields, and of facilitating the reciprocal exchange of mail items by establishing rules and rates for their conveyance. The United States is a party to multilateral agreements concluded under the auspices of the Universal Postal Union and of the Postal Union of the Americas and Spain, and to bilateral agreements. The multilateral agreements are concerned with the constitutions and the general regulations of the unions, and with the conventions and their regulations of execution governing letter post and, only recently, money orders in the Universal Postal Union, letter post, parcel post and money orders in the Postal Unions of the Americas and Spain. The bilateral agreements deal primarily with parcel post and money orders. The bilateral agreement with the United Nations is for the establishment of a United Nations Post Office Station.

International postal arrangements are Executive Agreements authorized by act of Congress (39 U.S.C. §§407(a), 408). They are transmitted to the Secretary of State for publication by the public printer pursuant to 39 U.S.C. §407(b), and they are to be published in the compilation entitled "United States Treaties and Other International Agreements" in accordance with 1 U.S.C. 112a.

Prior to the revision of title 39 of the United States Code pursuant to the Postal Reorganization Act of 1970, the applicable statutory provisions during the 25 year period after 1945 had been 39 U.S.C. §§505, 506 since 1960, and 5 U.S.C. §§372, 373 and 39 U.S.C. §712 before 1960.

The list of agreements with foreign postal administrations entered into by our postal administrations since World War II is attached.

Sincerely,

CHARLES H. FRITZEL,
Congressional Liaison Officer.

A. AGREEMENTS RELATING TO THE UNIVERSAL POSTAL UNION

1. 1947 UPU Convention, Final Protocol of the Convention, Regulations of Execution, and Final Protocol of the Regulations of Execution, signed in Paris.

2. 1952 UPU Convention, Final Protocol, Regulations of Execution, Airmail Convention and Final Protocol, signed in Brussels.

3. 1957 UPU Convention, Final Protocol, Regulations of Execution, Dispositions Concerning Airmail and Final Protocol, signed in Ottawa.

4. The Constitution of the Universal Postal Union, signed in Vienna on July 10, 1964, which establishes the principles governing the organization of the Union.

5. The Additional Protocol to the Constitution of the UPU; the General Regulations; the Convention and Detailed Regulations of the UPU; signed in Tokyo on November 14, 1969, which provide the basic acts of the Union, except for the 1964 Constitution, and the rules and regulations for the exchange of mail within the area of UPU membership; the UPU Acts of 1969 superseded those of 1964, except for the Constitution, which in turn superseded the Ottawa Acts of 1957, which superseded the Brussels Acts of 1952, which superseded the Paris Acts of 1947.

6. The Money Orders and Postal Travellers Cheques Agreement of the UPU, to which the US adhered in 1971.

B. AGREEMENTS RELATING TO THE POSTAL UNION OF THE AMERICAS AND SPAIN

1. PUAS Convention, Final Protocol, and Regulations of Execution signed in Rio de Janeiro in 1946; signed in Madrid in 1950; signed in Bogota in 1965; signed in Buenos Aires in 1960; and signed in Mexico in 1966.

2. PUAS Parcel Post Agreement, Final Protocol and Regulations of Execution, signed in Rio de Janeiro in 1946; signed in Madrid in 1950; signed in Bogota in 1955; signed in Buenos Aires in 1960; and signed in Mexico in 1966.

3. PUAS Money Order Agreement and Final Protocol, signed in Rio de Janeiro in 1946; signed in Madrid in 1950; signed in Bogota in 1955; signed in Buenos Aires in 1960; and signed in Mexico in 1966.

4. The Constitution, General Regulations, Convention and Regulations of Execution of the Postal Union of the Americas and Spain as signed in Santiago in 1971, but not yet approved by the President.

5. The Postal Money Order Agreement of the PUAS as signed in Mexico in 1966, which remains in effect until the agreement signed in Santiago in 1971 goes into effect on July 1, 1972.

6. The Parcel Post Agreement of the PUAS as signed in Mexico in 1966, which remains in effect until the agreement signed in Santiago in 1971 goes into effect on July 1, 1972.

C. BILATERAL PARCEL POST AGREEMENTS SIGNED SINCE 1945

Agreements	Signed	Effective
Australia.....	May 16, 1952	Aug. 1, 1952
Canada ¹	Jan. 12, 1961	July 1, 1961
Ceylon.....	July 18, 1955	July 1, 1956
China.....	July 30, 1957	Nov. 1, 1957
	Aug. 19, 1957	
Czechoslovakia.....	Sept. 15, 1950	Oct. 1, 1950
	Sept. 29, 1950	
Ethiopia.....	June 15, 1967	Sept. 1, 1967
Fiji (United Kingdom).....	Apr. 22, 1965	July 1, 1965
Ghana.....	June 14, 1951	Aug. 1, 1951
Guatemala.....	Nov. 30, 1945	Aug. 1, 1945
Hong Kong.....	Feb. 2, 1961	July 1, 1961
India.....	Sept. 17, 1954	Jan. 1, 1955
Iran.....	Aug. 28, 1969	Jan. 1, 1971
Japan.....	Nov. 3, 1953	May 1, 1953
Korea.....	Apr. 13, 1949	Dec. 1, 1949
Do.....	Aug. 17, 1960	Jan. 1, 1961
Kuwait.....	Oct. 21, 1963	Sept. 16, 1964
Liberia.....	May 9, 1957	Aug. 1, 1957
Netherlands West Indies.....	May 17, 1951	
Nicaragua.....	Apr. 4, 1956	June 1, 1956
Pakistan.....	Oct. 7, 1955	Jan. 1, 1956
Papua—New Guinea.....	June 20, 1958	Oct. 1, 1958
Philippines.....	Nov. 12, 1964	Nov. 1, 1965
Portugal.....	Feb. 27, 1959	May 1, 1959
Rhodesia.....	July 19, 1965	
Ryukyu Islands.....	July 30, 1954	Oct. 15, 1954
Spain.....	Aug. 30, 1955	Jan. 1, 1956
Tanzania.....	Dec. 30, 1959	May 1, 1960

¹ An agreement for the exchange of all categories of mail.

Agreements	Signed	Effective
Thailand.....	June 7, 1962	Oct. 1, 1962
Trinidad and Tobago.....	Mar. 18, 1968	May 1, 1968
Egypt.....	Jan. 13, 1959	Oct. 1, 1959
United Nations ¹	Mar. 28, 1951	Oct. 24, 1951
Yugoslavia.....	Sept. 1, 1950	Jan. 1, 1950

¹ An agreement permitting the United Nations to establish a UN Post Office Station.

D. BILATERAL MONEY ORDER AGREEMENTS SIGNED SINCE 1945

Agreements	Signed	Effective
Guyana	Nov. 4, 1957	Jan. 1, 1958
Taiwan	Nov. 14, 1957	Jan. 1, 1958
Egypt	Oct. 31, 1957	
Ryukyu Islands	Feb. 10, 1956	
Japan	Dec. 10, 1953	May 1, 1954
Antigua	Mar. 2, 1957	Dec. 1, 1957
British Virgin Islands	Mar. 14, 1957	July 1, 1957
Montserrat	Mar. 15, 1957	Sept. 1, 1957
St. Christopher, Nevis, and Anguilla	Sept. 14, 1959	Feb. 1, 1960
Neth. Antilles	Jan. 11, 1961	May 1, 1961
Philippines	Jan. 29, 1951	Apr. 1, 1951
Morocco	Nov. 30, 1961	Apr. 2, 1962
Thailand	Feb. 21, 1962	
Vatican City	Dec. 22, 1955	
Lebanon	Jan. 21, 1946	July 1, 1947
China	Nov. 14, 1957	Oct. 1, 1957

THE DEPARTMENT OF THE TREASURY,
UNITED STATES SECRET SERVICE,
Washington, D.C., April 4, 1972.

HON. SAM J. ERVIN, JR.
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR ERVIN: Reference is made to your letter of inquiry, dated March 30, 1972, regarding executive agreements with foreign states since World War II.

The United States Secret Service has not entered into or participated in executive agreements with any foreign state since World War II.

Sincerely yours,

JAMES J. ROWLEY.

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., April 5, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: This will respond to your request of March 30, 1972, for a list of all executive agreements, since World War II, in which the Securities and Exchange Commission has participated, along with the purpose of and authority for the agreements.

On giving your request careful consideration, we are convinced that there have been no such executive agreements in which the Commission has participated.

Notwithstanding the above, we note for your information that, as a result of recommendations of this Commission which participated in the negotiations, a Supplemental Extradition Convention between the United States and Canada covering criminal offenses arising under the federal securities laws was signed by both governments on October 26, 1951, and went into effect on July 11, 1952. This treaty was submitted as Executive G to the United States Senate which, after approval by two-thirds of the members present, advised and consented to its ratification on April 1, 1952 (98 Cong. Rec. 3241-2, 1952). This was quite obviously a treaty, not an executive agreement, so does not appear to come within the scope of your Subcommittee's present concern. We mention it only in case it may be of some interest to you.

Sincerely yours,

WILLIAM J. CASEY, *Chairman.*

U.S. GOVERNMENT,
SMALL BUSINESS ADMINISTRATION,
Washington, D.C., April 5, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: This will reply to your letter of March 30, 1972, concerning the study of executive agreements with foreign states being conducted by the Subcommittee on Separation of Powers.

The Small Business Administration has not entered into any such agreements.

Sincerely,

THOMAS S. KLEPPE,
Administrator.

WASHINGTON, D.C., May 16, 1972.

HON. SAM J. ERVIN, JR.
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter requesting information regarding agreements entered into by Government agencies with foreign states.

The Smithsonian is a unique instrumentality created by Act of Congress in 1846 to implement the trust obligations for the United States to administer the bequest of James Smithson "for the increase and diffusion of knowledge among men." (20 U.S.C. §41 et seq). The entire management of the Institution rests with an independent Board of Regents, with members drawn from the three branches of the government as well as the general public. In accordance with its mandate, the Smithsonian conducts scientific research on a world-wide basis. Two of its principal international activities are the Smithsonian Astrophysical Observatory (SAO), and the Special Foreign Currency Program, administering counterpart funds annually appropriated to the Smithsonian by the Congress. These counterpart funds are used for research projects in the field of archeology and related disciplines, systematic and environmental biology, astrophysics and earth sciences, and museum programs.

In the course of its activities, SAO has entered into a series of agreements with agencies of foreign governments regarding the operation of satellite tracking stations. In connection with the Special Foreign Currency Program, the Smithsonian has entered into an agreement with an agency of the Yugoslav Government, the Federal Administration for International Technical Cooperation; this agreement governs the conduct of research projects within Yugoslavia. There is a similar understanding with the Government of Tunisia, which was not accomplished directly by the Smithsonian but through an exchange of notes between the United States Embassy in Tunisia and the Tunisian Ministry of Foreign Affairs.

I have attached a listing of these agreements. We would, of course, be happy to supply the full text of these documents if that would be useful to your Subcommittee.

Sincerely yours,

S. DILLON RIPLEY, *Secretary.*

LIST OF AGREEMENTS BETWEEN THE SMITHSONIAN INSTITUTION AND AGENCIES
OF FOREIGN GOVERNMENTS

(1) *Agreements Relative to SAO Satellite Tracking Program*

Argentina..... Exchange of letters U.S. Embassy-Ministry of Foreign Affairs appointing Smithsonian and Comision Nacional de Investigaciones Espaciales (CNIE) as cooperating agencies.—Implementing agreement SAO/CNIE, dated February 1, 1936, for operation of STP station.—Use of land agreement SAO/CNIE, dated March 11, 1966.

Australia-----	Cooperating agency agreement between NASA and Department of Supply (DOS), dated February 18, 1966, designating Smithsonian to operate STP station. This agreement is covered by country to country agreement (See Document No. 44, 89th Cong., 1st sess., Senate, pp. 21-26).
Brazil-----	SAO-Comissao Nacional de Atividades Espaciais for operation of STP station, dated March 29, 1966.
Ethiopia-----	Exchange of letters U.S. Embassy and Foreign Ministry appointing Smithsonian and Haile Sellassie I University as cooperating agencies.—SAO/Haile Sellassie I University implementing agreement, dated May 11, 1966, for operation of STP station.
France-----	SAO/Centre National de la Recherche Scientifique and Centre National d'Etudes Spatiales agreement, dated February 4, 1970, for operation of STP station at Dakar, Senegal, for duration of ISAGEX experiment.—SAO/Centre National d'Etudes Spatiales facility agreement, dated December 8, 1971.
Greece-----	SAO/National Technical University, Athens, agreement, dated October 3, 1966, for establishment and operation of STP station.
India-----	SI/Uttar Pradesh State Observatory, Naini Tal, agreement, dated January 13, 1964, for operation of STP station.
Italy-----	SAO/Commissione Geodetica della Repubblica Italiana agreement, dated March 27, 1971, for joint operation of STP station in Ethiopia.
Japan-----	SI/Tokyo Astronomical Observatory agreement, dated May 27, 1957, for operation of STP station.
Peru-----	SI/National University of San Augustin, Arequipa, agreement, dated October 6, 1961, for land and structures for STP station.—SI/Geographical Institute of Peru agreement, dated August 2, 1961, for operation of STP station.
South Africa-----	Exchange of letters External Affairs-U.S. Embassy, agreement, dated September 13, 1960, establishing NASA and Council for Scientific and Industrial Research as cooperating agencies. This exchange is covered by a country to country agreement (see document referenced under Australia, pp. 143-148).
Spain-----	SAO/Instituto de Marina, San Fernando, dated August 31, 1959, for operation of STP station.

(2) Agreements Relative to Special Foreign Currency Program

Tunisia-----	Government of the United States/Government of Tunisia agreement, dated July 17, 1968, for basic research in archeology and related disciplines, in systematic and environmental biology.
Yugoslavia-----	SI/Federal Administration for International Technical Cooperation, agreement, dated June 22, 1967.

EXECUTIVE OFFICE OF THE PRESIDENT,
SPECIAL ACTION OFFICE FOR DRUG ABUSE PREVENTION,
Washington, D.C., March 31, 1972.

HON. SAM J. ERVIN, JR.,
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary
Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for your letter of March 30, 1972, in regard to executive agreements into which the Special Action Office has entered with foreign states since World War II.

Inasmuch as the Office was just established under P.L. 92-255 on March 21, 1972, no such agreements have as yet been undertaken.

Sincerely,

JOHN K. MEAGHER,
Director, Congressional Relations.

U.S. TARIFF COMMISSION,
April 6, 1972.

HON. SAM J. ERVIN, JR.
Chairman, Subcommittee on Separation of Powers,
U.S. Senate,
Washington, D.C. 20510

DEAR SENATOR ERVIN: I have your letter of March 20, 1972, regarding your Subcommittee's present examination of executive-legislative relations in foreign affairs with special emphasis on executive agreements. You ask for a report listing all executive agreements, since World War II, in which the Tariff Commission has participated, along with the purpose of and authority for the agreements.

In the period since World War II the Tariff Commission has provided varying degrees of fact finding and technical assistance in connection with the negotiation of and operations under the following executive agreements:

(1) The multinational agreement, known as the General Agreement on Tariffs and Trade (GATT). Six major rounds of multinational negotiations were concluded in the period 1947-1967; and a number of sessions were held for the accession of new contracting parties, most important of which, from the United States' point of view, perhaps being that with respect to the accession of Japan in 1955. These negotiations were conducted under authority of section 350 of the Tariff Act of 1930 (the Trade Agreements Act of 1934, as amended and extended; 19 U.S.C. 1351) until 1962 when that authority was supplanted by the provisions of the Trade Expansion Act of 1962 (19 U.S.C. 1821 *et seq.*). The purpose of the trade-agreements program, as set forth in the 1934 Act, was to stimulate the economic growth of the United States by expanding foreign markets for the nation's products. In the case of the 1962 Act, additional purposes were to strengthen economic relations in the free world and to prevent communist economic penetration in the free world.

(2) The agreement between the United States and the Republic of the Philippines concerning trade and related matters. The Philippine Trade Act of 1946, as amended by the Philippine Trade Agreement Revision Act of 1955 (22 U.S.C. 1371-1379), authorized this agreement, which, in substance, provides for the granting of preferential tariff treatment to products of the Republic of the Philippines during the period 1946 to 1974. The purposes of this agreement are the strengthening of the economy of the Philippines and the maintenance of close economic ties between the United States and the Philippines.

(3) The Long Term Arrangement Regarding International Trade in Cotton Textiles, negotiated in February 1962 under authority of section 204 of the Agricultural Adjustment Act of 1956, as amended (7 U.S.C. 1854). The purpose of this agreement is to provide a means for dealing with market disruption in international trade in cotton textiles by establishing a basis for imposing quantitative limits on such cotton textiles.

(4) The United States-Canadian Automotive Agreement, concluded January 16, 1965. The implementation of this agreement by Presidential Proclamation was authorized by the Automotive Products Trade Act of 1965, approved October 21, 1965 (19 U.S.C. 2001 *et seq.*). The purposes of the agreement—(1) the creation of a broader market for automotive products within which the full benefits of specialization and large scale production could be achieved; (2) the liberalization of United States and Canadian automotive trade in respect to tariff barriers and other factors tending to impede it, with a view of enabling the industries of both countries to participate on a fair and equitable basis in the expanding total market of the two countries; and (3) the development of conditions in which market forces may operate effectively to obtain the most economic pattern of investment, production and trade.

(5) Agreement Relating Principally to Chemicals, Supplementary to the Geneva (1967) Protocol to the General Agreement on Tariffs and Trade (GATT). This agreement has not been implemented and there is no current delegated authority under which the President could implement it. The President sought such authority as part of the Trade Act of 1969 which was introduced in the House of Representatives as H.R. 14870, 91st Congress. The Congress gave consideration to this proposal in various bills relating to the "Trade Act of 1970" but no legislation was enacted for this purpose, nor has any such legislation been enacted to date. The purpose of the Supplemental Agreement was the desire of the contracting parties thereto to exchange "further tariff and other

concessions under the General Agreement on Tariffs and Trade *** additional to those under the Geneva (1967) Protocol to the General Agreement * * *, principally with respect to chemicals".

(6) The International Antidumping Code signed at Geneva on June 30, 1967, as part of the Kennedy Round. Insofar as the United States is concerned, the code went into effect on July 1, 1968. The President has taken no formal action, by Proclamation or otherwise, to domestically implement the Code, stating that such action was not necessary. The purpose of the Code in substance was "to interpret the provisions of Article VI of the General Agreement [which deals with dumping in international trade] and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation".

In addition to the foregoing, there have been numerous subordinate consultations and negotiations within the framework of the GATT and of the various bilateral trade agreements to which the United States has been a party in connection with which the Tariff Commission has furnished fact finding and technical assistance to the President. These matters include, among other things, sessions relating to the adoption in 1963 by the United States of new tariff provisions known as the Tariff Schedules of the United States and various other activities related to actions by the United States under the escape clause and other provisions of trade agreements.

If we can be of further assistance, please let us know.

Sincerely yours,

CATHERINE BEDELL,
Chairman.

USAEC PARTICIPATION—U.S. EXECUTIVE AGREEMENTS

I. AGREEMENTS FOR COOPERATION IN THE CIVIL USES OF ATOMIC ENERGY (AS HAVE BEEN AMENDED OR SUPERSEDED)

Purpose.—Establish basis for cooperative activities, permit the export of certain equipment and of special nuclear material, and provide for safeguards to ensure the peaceful uses of such exported items.

Authority.—Atomic Energy Act of 1954, as amended.

A. Research level applications, including fueling of research reactors:

Argentina (TIAS 3299, 4527).

Austria (TIAS 3600, 4402, 6136).

Brazil (TIAS 3303, 4255, 4539, 5110, 5676, 6126).

Chile (TIAS 3306).

China, Rep. of (TIAS 3307, 4176, 4514, 5105, 5623, 6099).

Colombia (TIAS 3308, 5330, 6943).

Costa Rica (TIAS 4682).

Cuba (TIAS 3911).

Denmark (TIAS 3309, 3753, 4093, 6538).

Dominion Republic (TIAS 3711).

Ecuador (TIAS 3983).

Germany, Federal Republic (TIAS 3543, 3765; F.R.G. on behalf of W. Berlin (TIAS 3874, 5109)).

Greece (TIAS 3310, 4837, 5250, 5251, 6478, 6853).

Guatemala (TIAS 3802).

Indonesia (TIAS 4557, 6124, 7001).

Iran (TIAS 4207, 6219, 6726).

Ireland (TIAS 4059, 4690, 5511, 6532).

Israel (TIAS 3311, 4407, 4507, 5079, 5723, 5909, 6091).

Italy (TIAS 3312).

Japan (TIAS 3465).

Korea (TIAS 3490, 4030, 5957).

Lebanon (TIAS 3313).

Netherlands (TIAS 3461).

New Zealand (TIAS 3626, 4526).

Nicaragua (TIAS 3998).

Pakistan (TIAS 3315).

Panama (TIAS 5370).

Peru (TIAS 3483).
 Philippines (TIAS 3316, 4515, 5677, 6119).
 Portugal (TIAS 3317, 3899, 4519, 5111, 5679, 6717).
 Spain (TIAS 3318).
 Sweden (TIAS 3477, 3775, 4035, 5143).
 Switzerland (TIAS 3319).
 Thailand (TIAS 3522, 3842, 4533, 5122, 5765).
 Turkey (TIAS 3320, 4748, 5828, 6040, 7122).
 United Kingdom (TIAS 3321, 3359, 3608, 5397, 5693, 5829, 6050, 6966).
 Uruguay (TIAS 3476).
 Venezuela (TIAS 3323).
 Viet Nam (TIAS 4251, 5622).

B. Research and power applications, including fueling of research and power reactors:

Argentina (TIAS 5125, 5660, 6721).
 Australia (TIAS 3830, 4687, 6250).
 Austria (TIAS 6815).
 Belgium (TIAS 3301, 3738, 4317, 5454).
 Canada (TIAS 3304, 3771, 4518, 5102).
 Finland (TIAS 6896).
 France (TIAS 3689, 3883, 4319, 4694, 5128, 5644).
 Germany, Federal Republic (TIAS 3877, 4314, 5120).
 Italy (TIAS 4016, 4689).
 Japan (TIAS 4133, 4172, 5553, 6517).
 Netherlands (TIAS 3876, 4339).
 Norway (TIAS 3826, 6260, 6849).
 Philippines (TIAS 6522).
 South Africa (TIAS 3885, 5129, 6312).
 Spain (TIAS 3988, 5990).
 Sweden (TIAS 6076, 7000).
 Switzerland (TIAS 3745, 4236, 4618, 6059).
 Venezuela (TIAS 4416, 6945).

C. Power applications, including fueling power reactors:

India (TIAS 5446).

United Kingdom (TIAS 6046).

D. Civil uses Agreements for Cooperation with international organizations.

1. EURATOM—Agreement for cooperative intent (TIAS 4091); Joint Program for research and development, including fueling of power-producing reactors (TIAS 4173, 5103); Additional Agreement for use of special nuclear material—power reactor and fuel reprocessing facilities (TIAS 4650, 5104, 5444).

Authority.—In addition to the 1954 Atomic Energy Act, the EURATOM Cooperation Act of 1958.

2. International Atomic Energy Agency—Agreement providing for the U.S. making special nuclear material and equipment available to the Agency—an enabling agreement in support of the varied program of the IAEA in the peaceful uses of atomic energy (TIAS 4291).

Authority.—In addition to the 1954 Atomic Energy Act, the IAEA Participation Act of 1957 and the Statute of the IAEA.

II. SAFEGUARDS

A. Trilateral safeguards transfer agreements among the U.S., a "civil uses" agreement country, and the International Atomic Energy Agency.

Purpose.—Provides for the application of IAEA safeguards to materials and equipment transferred from the U.S. under the civil uses Agreement for Cooperation.

Authority.—Atomic Energy Act of 1954, as amended, and IAEA Statute.

Argentina (TIAS 6004, 6722).

Australia (TIAS 6117).

Austria (TIAS 5914, 6816).

Brazil (TIAS 6583).

China, Rep. of (TIAS 5882, 7228).

Colombia (TIAS 7010).

Denmark (TIAS 6459).
 Greece (TIAS 5952).
 India (TIAS 7049).
 Indonesia (TIAS 6391).
 Iran (TIAS 6390, 6741).
 Israel (TIAS 6027).
 Japan (TIAS 5429, 6388, 6520).
 Korea (TIAS 6435).
 Philippines (TIAS 5879, 6524).
 Portugal (TIAS 5915, 6718).
 South Africa (TIAS 5880, 6306).
 Spain (TIAS 6182).
 Sweden (not yet printed).
 Switzerland (not yet printed).
 Thailand (TIAS 5861).
 Turkey (TIAS 6692).
 Venezuela (TIAS 6433).
 Viet Nam (TIAS 5884).

B. Special safeguards agreements with:

1. Canada (TIAS 6649).

Purpose.—Provides for the U.S. guarantee of the peaceful use of certain small quantities of Canadian natural uranium while they are in the U.S.

Authority.—Atomic Energy Act of 1954, as amended.

2. International Atomic Energy Agency (TIAS 5002, 5621, 6769, 6826).

Purpose.—Provides for the application of safeguards by the IAEA to 4 U.S. reactors, basically to provide an opportunity for the Agency to gain "field" experience in the development and application of its safeguards system.

Authority.—Atomic Energy Act of 1954, as amended, and Statute of the IAEA.

III. MUTUAL DEFENSE AGREEMENTS

Purpose.—Provide for the communication of classified information on the use and effects of atomic weapons and provision of non-nuclear parts of weapons systems.

Authority.—Atomic Energy Act of 1954, as amended.

Australia (TIAS 3881—information only).

Belgium (TIAS 5157).

Canada (TIAS 3305—information only).

France (TIAS 4867).

Germany, Fed. Rep. (TIAS 4276).

Greece (TIAS 4292).

Italy (TIAS 4764).

Netherlands (TIAS 4277).

Turkey (TIAS 4278).

United Kingdom (TIAS 3322—information only).

NATO (TIAS 3521, 5768—information only).

Others having additional coverage:

Canada (TIAS 4271—includes provision of submarine technology).

France (TIAS 4268—includes provision of submarine fuel material).

United Kingdom (TIAS 4078, 4267, 6659, 6861—amended agreement providing for transfer of submarine technology, submarine reactors and fuel, weapons manufacture technology, and nuclear material and parts for weapons).

IV. OTHERS

A. "Atoms for Peace" grants for research and training equipment and materials.

Purpose.—Establish the basic terms governing provision of financial grants for the purchase of various materials and equipment needed by universities and hospitals in such disciplines as medicine, agriculture, and physics.

Authority.—Atomic Energy Act, as amended, and Section 419 of the Mutual Security Act of 1954.

Argentina (TIAS 4508, 5504).

Brazil (TIAS 4547, 4727, 5337).

Chile (TIAS 4457).
 China, Rep. of (TIAS 4371).
 Colombia (TIAS 4421).
 Guatemala (TIAS 4485).
 India (TIAS 4505, 5288).
 Ireland (TIAS 4453).
 Israel (TIAS 4655).
 Korea (TIAS 4617).
 Lebanon (TIAS 4343).
 New Zealand (TIAS 4445).
 Peru (TIAS 4304).
 Yugoslavia (TIAS 4731).
 B. N.S. "Savannah".

Purpose.—Establish understandings regarding the operation of the N.S. "Savannah".

Authority.—Atomic Energy Act of 1954, as amended, and Safety of Life at Sea Convention.

Belgium (TIAS 5466).
 China, Rep. of (TIAS 6303).
 Denmark (TIAS 5612).
 Germany, Fed. Rep. (TIAS 5223).
 Greece (TIAS 5099, 6216).
 Ireland (TIAS 5651).
 Italy (TIAS 5699, 5938).
 Netherlands (TIAS 5357, 5358, 5892).
 Norway (TIAS 5576).
 Portugal (TIAS 5740).
 Spain (TIAS 5626).
 Sweden (TIAS 5613).
 United Kingdom (TIAS 5633, 6288).
 Yugoslavia (TIAS 6326).
 C. Australia-U.S. cooperative study of the radioactivity of the upper atmosphere by balloons (TIAS 4739, 5231, 6017, 6078, 6092, 6680).

Authority.—Atomic Energy Act of 1954, as amended.

D. Cooperative programs on uranium reconnaissance with a view to developing sources available to the U.S.:

Authority.—Atomic Energy Act of 1954, as amended.

Brazil (TIAS 3385, 3872, 3964, 4537).

Chile (TIAS 3912, 4396).

E. Mexico-IAEA-U.S. desalting agreement (TIAS 5874).

Purpose.—Provided for joint study group to make a preliminary assessment of the technical and economic practicability of a dual-purpose reactor (produce fresh water and electricity) in border areas.

Authority.—Atomic Energy Act of 1954, as amended.

DEPARTMENT OF TRANSPORTATION,
 THE SECRETARY OF TRANSPORTATION,
 Washington, D.C., April 10, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation, of Powers,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: This is in response to your letter of March 20, 1972, requesting a list of all executive agreements with foreign states, which this Department has participated in since World War II.

Enclosed is a list of the agreements, below the diplomatic level, to which this Department is a party. The Department of State has agreed to prepare and submit a list of the international agreements negotiated at the diplomatic level.

Sincerely,

JOHN A. VOLPE.

AGREEMENTS BELOW DIPLOMATIC LEVEL OF WHICH DOT IS A PARTY, 1945-72

Date	Agreement	Country	Purpose	Authority
Oct. 7, 1957	Agreement between Royal Canadian Navy and U.S. Coast Guard.	Canada	Search and rescue cooperation.	14 U.S.C. 88.
Aug. 8, 1965	Agreement between Canadian Defence Staff and U.S. Coast Guard.	do	do	Do.
Feb. 27, 1951	Country Agreement (Ethiopia and U.S. Bureau of Public Roads).	Ethiopia	Reorganize Ethiopian Highway Authority.	Federal Highway Act (23 U.S.C. 308).
Oct. 5, 1954	Exchange of notes United States and Guatemala.	Guatemala	Construct the Inter-American Highway.	Do.
June 18, 1970	Memorandum of understanding (research cooperation).	Canada	To promote research and development cooperation between Canada and the United States in finding solutions to transportation problems of mutual concern.	DOT Act of 1966 (49 U.S.C. 1653).
June 29, 1968	do	Czechoslovakia	To promote research and development cooperation between Czechoslovakia and the United States in finding solutions to transportation problems of mutual concern.	Do.
Mar. 3, 1969	do	France	To promote research and development cooperation in the area of fog dispersal techniques and equipments.	Do.
June 2, 1969	Memorandum of understanding	do	To promote research and development cooperation in the areas of road and highway safety.	Do.
Mar. 3, 1969	do	do	To promote research and development cooperation in the area of airport guidance and control.	Do.
Feb. 14, 1972	do	do	To promote research and development cooperation between France and the United States in finding solutions to transportation problems of mutual concern.	Do.
Oct. 3, 1969	do	Italy	To promote research and development cooperation between Italy and the United States in finding solutions to transportation problems of mutual concern.	Do.
Nov. 3, 1971	do	Poland	To promote research and development cooperation between Poland and the United States in finding solutions to transportation problems of mutual concern.	Do.
Nov. 1, 1971	do	Romania	To promote research and development cooperation between Romania and the United States in finding solutions to transportation problems of mutual concern.	Do.
Nov. 10, 1971	do	Spain	To promote research and development cooperation between Spain and the United States in finding solutions to transportation problems of mutual concern.	Do.

AGREEMENTS BELOW DIPLOMATIC LEVEL OF WHICH DOT IS A PARTY, 1945-72—Continued

Date	Agreement	Country	Purpose	Authority
Nov. 5, 1970	Bilateral agreement on cooperation in research and development related to experimental safety vehicles.	Federal Republic of Germany.	Exchange of research and development information.	DOT Act of 1966 (49 U.S.C. 1653) and National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 139).
Nov. 18, 1970	do	Japan	do	Do.
May 11, 1971	do	United Kingdom	do	Do.
May 11, 1971	do	Italy	do	Do.
Oct. 7, 1971	do	France	do	Do.
Mar. 15, 1972	do	Sweden	do	Do.
Oct. 6, 1971	Flight Inspection Agreement	Austria ¹	To conduct flight inspection of air navigation facilities on a reimbursable basis.	Do.
Oct. 27, 1971	Training Agreement	Algeria ¹	To provide training to foreign nationals at the FAA Academy of Oklahoma City, on a reimbursable basis.	Do.
July 9, 1971	Loan Agreement	Argentina ¹	To make aviation equipment available to developing countries on a loan basis to improve air navigation and communications on air routes used by United States and international carriers.	Do.
Aug. 5, 1971	Procurement Agreement	Pakistan ¹	To provide directly or through other U.S. elements, services, equipment, or other items to developing countries on a reimbursable basis.	Do.
Apr. 1, 1972	Research and Development Agreement	Canada ¹	To arrange for the evaluation of overall performance of equipment developed to meet the needs of safe, efficient aircraft operations.	FAA Act of 1958, as amended.
Oct. 23, 1971	Technical Services Agreement	Zaire ¹	To provide services of technical teams to advise and assist foreign countries in establishing modern, safe and efficient aviation systems and to develop aviation standards which meet requirements for civil aviation operations.	Do.

¹ Similar agreements were concluded with the following countries under the same authority: Iran, Spain, Argentina, Kuwait, Nicaragua, Costa Rica, and Guatemala.

² Similar agreements have been concluded with numerous countries and must have expired within 1 year of the date signed.

212, 213, 216, 303 and 309: Costa Rica, Honduras, El Salvador, Nicaragua, Panama, and Colombia

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 10, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers,
Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to your request of March 30, 1972, there is transmitted herewith a list of executive agreements in which this Department has participated since World War II.

Sincerely yours,

ROY T. ENGLAT
Acting General Counsel.

TREASURY DEPARTMENT

EXECUTIVE AGREEMENTS PARTICIPATED IN SINCE WORLD WAR II

CUSTOMS

1. Protocol modifying the Convention of July 5, 1890, relating to the creation of an international union for the publication of Customs tariffs. Entered into force for the United States, February 15, 1957, 8 UST 1669.

2. Convention establishing a Customs Cooperation Council. Entered into force for the United States, November 5, 1970, 22 UST 320.

Pursuant to our joining the Customs Cooperation Council, the United States has adopted a number of recommendations of the Council. Specifically, we have accepted the "Recommendation for the Pooling of Information concerning Persons Convicted of Customs Offenses," the "Recommendation of the Customs Cooperation Council on the Pooling of Information concerning Customs Fraud," and the "Recommendation of the Customs Cooperation Council on the Spontaneous Exchange of Information concerning Illicit Traffic in Narcotic Drugs and Psychotropic Substances."

3. Agreement providing tariff concessions on certain items. Entered into force for the United States, July 25, 1955, 6 UST 6229.

4. International convention to facilitate the importation of commercial samples and advertising material. Entered into force for the United States, October 17, 1957, 8 UST 1636.

5. Customs convention regarding E.C.S. carnets for commercial samples. Entered into force for the United States, March 3, 1969, 20 UST 120.

6. Customs convention on containers. Entered into force for the United States, March 3, 1969, 20 UST 301.

7. Customs convention on the international transport of goods under cover of TIR carnets. Entered into force for the United States, March 3, 1969, 20 UST 184.

8. Customs convention on the temporary importation of professional equipment. Entered into force for the United States, March 3, 1969, 20 UST 33.

9. Customs convention on the A.T.A. carnet for temporary admission of goods. Entered into force for the United States, March 3, 1969, 20 UST 58.

All of these agreements were entered into with the advice and consent of the Senate, the exact dates being cited within the United States Treaty series, except for the agreement providing tariff concessions on certain items, which was made pursuant to the Act of July 8, 1954, c.466, 68 Stat.454.

OFFICE OF THE ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS

Executive agreements negotiated since World War II by the Treasury Department with citations to relevant authority (dates refer to Annual Reports of the Secretary of the Treasury, which are transmitted to Congress, and which describe or contain the cited agreements). Unless otherwise indicated, these agreements were entered into pursuant to Section 10 of the Gold Reserve Act of 1934.

1945

Extension of stabilization agreement of 1941 between the United States and Mexico.

Extension of 1942 agreement between the United States and Cuba on the sale of gold to Cuba.

Acceptance of United States membership in the International Monetary Fund and the International Bank for Reconstruction and Development, specifically authorized by the Act of July 31, 1945, P.L. 171, 59 Stat. 512.

1946

Anglo-American Financial Agreement of December 6, 1945, specifically authorized by P.L. 509, 79th Cong., S.J. Res. 138.

1947

Executive of new U.S.-Mexican stabilization agreement.

1949

Agreement supplementing U.S.-Mexican stabilization agreement of May 1947.

1952

Execution of a new stabilization agreement between the United States and Mexico.

1953

Execution of new stabilization agreement between the United States and Mexico.

1954

Execution of new stabilization agreement between the United States and Peru.

1955

Extension of the 1954 stabilization agreement between the United States and Peru.

Acceptance of membership for the United States in the International Finance Corporation, specifically authorized by the Act of August 11, 1955, P.O. 350, 69 Stat. 669, as amended.

1956

Execution of a new exchange agreement between the United States and Mexico.

Execution of the 1955 exchange agreement between the United States and Peru.

Execution of a new exchange agreement between the United States and Chile.

1957

Amendment to the Anglo-American Financial Agreement of 1945, specifically authorized by P.L. 509, 79th Cong., S.J. Res. 138.

Execution of new exchange agreement between the United States and Bolivia.

Extension of the 1955 exchange agreement between the United States and Peru.

Extension of the 1956 exchange agreement between the United States and Chile.

1958

Execution of new exchange agreement between the United States and Paraguay.

Execution of new exchange agreement between the United States and Nicaragua.

Extension of the 1957 exchange agreement between the United States and Bolivia.

Extension of the 1956 exchange agreement between the United States and Mexico.

Execution of a new exchange agreement between the United States and Peru.

Extension of the 1956 exchange agreement between the United States and Chile.

1959

Acceptance of membership for the United States in the Inter-American Development Bank, specifically authorized by the Act of August 7, 1959, P.L. 86-147, 73 Stat. 299, as amended.

Execution of new exchange agreement between the United States and Argentina.

1960

Extension of the 1956 exchange agreement between the United States and Mexico.

Acceptance of membership in the International Development Association, specifically authorized by the Act of June 30, 1960, P.L. 86-565, 74 Stat. 293, as amended.

1961

Execution of new exchange agreement between the United States and Brazil on May 17, 1961.

1962

Execution of new exchange agreement between the United States and El Salvador.

Execution of new exchange agreement between the United States and Costa Rica.

Extension of 1959 exchange agreement between the United States and Argentina.

Execution of new exchange agreement between the United States and the Philippines.

1963

U.S. adherence to the special borrowing arrangements of the International Monetary Fund, specifically authorized by Act of June 19, 1962, P.L. 87-490, 76 Stat. 105.

Extension of 1962 exchange agreement between the United States and the Philippines.

1964

Extension of the 1956 exchange agreement between the United States and Mexico.

1965

Amendment to 1961 exchange agreement between the United States and Brazil.

Execution of new exchange agreement between the United States and Chile.

1966

Execution of new exchange agreement between the United States and Mexico.

Execution of new exchange agreement between the United States and Venezuela.

Execution of new exchange stabilization agreement between the United States and Colombia.

1967

Acceptance of United States membership in the Asian Development Bank, specifically authorized by the Act of March 16, 1966, P.L. 89-369, 80 Stat. 73.

Settlement of 1929 loan to Greece, specifically authorized by Act of November 5, 1966, P.L. 89-766, 80 Stat. 1314.

1968

Acceptance of an amendment to the articles of the International Monetary Fund establishing Special Drawing Rights, specifically authorized by Act of June 19, 1968, P.L. 90-349, 82 Stat. 188.

Execution of new exchange agreement between the United States and Mexico.

Execution of new exchange agreement between the United States and Nicaragua.

Execution of new exchange agreement between the United States and Venezuela.

Execution of new exchange agreement between the United States and Argentina.

1970

Extension of the 1968 exchange agreement between the United States and Mexico.

TAX

(1) *Defense Expenditures—Exemption from Taxation.*

Note.—The agreements in this group relate to exemption from taxes, duties, fees, and charges in the foreign countries with respect to expenditures by or on behalf of the United States in such foreign countries for goods, facilities, and services for the common defense effort, including expenditures for United States foreign aid programs. The agreements are, in a broad sense, in implementation of agreements dealing with mutual defense assistance, mutual security, and foreign aid.

(a) *Authority—*

P.L. 82-165, Mutual Security Act of 1951, October 10, 1951, 65 Stat. 373, 22 U.S.C. 1651 et seq. (see espec. 1672), as amended: P.L. 82-400, June 20, 1952, 66 Stat. 141; P.L. 83-118, July 16, 1953, 67 Stat. 152; P.L. 83-665, August 26, 1954, 68 Stat. 832.

P.L. 83-665, Mutual Security Act of 1954, August 26, 1954, 68 Stat. 832, 22 U.S.C. 1750 et seq., as amended: P.L. 84-138, July 8, 1955, 69 Stat. 283; P.L. 84-726, July 18, 1956, 70 Stat. 555.

(b) *Agreements—18.*

1952—11. TIAS 2477 (Japan), 2538 (Luxembourg), 2546 (Denmark), 2556 (France), 2557 (Iceland), 2559 (United Kingdom), 2563 (Netherlands), 2566 (Italy), 2655 (France), 2719 (Belgium), 2720 (Norway)

1953—4. TIAS 2775 (Greece), 2784 (Portugal), 2871 (Yugoslavia), 3120 (Netherlands)

1954—2. TIAS 2996 (Turkey), 3360 (Fed. Rep. of Germany)

1956—1. TIAS 3712 (France)

(2) *Taxation, Double—Shipping and Aircraft Profits.*

Note.—The agreements in this group accord, on a reciprocal basis, exemption from income tax on earnings from the operation of ships or aircraft. Prior to 1943 a number of agreements were made under the same or similar authority for tax exemption with respect to shipping profits.

(a) *Authority—*

P.L. 76-1, Internal Revenue Code of 1939, secs. 212 (b) and 231 (d), 53 Stat. 76, 26 U.S.C. 212 (b), 231 (d), as amended: P.L. 80-514, May 4, 1948, 62 Stat. 210.

P.L. 83-591, Internal Revenue Code of 1954, August 16, 1954, secs. 872, 883, 68 Stat. 3, 280, 283, 26 U.S.C. 872, 883.

(b) *Agreements—7.*

1947—1. TIAS 1596 (Finland, shipping).

1950—1. TIAS 2088 (Argentina, shipping and aircraft).

1953—1. TIAS 2858 (Belgium, aircraft).

1954—1. TIAS 3003 (Fed. Rep. of Germany, aircraft).

1961—1. TIAS 4916 (Colombia, shipping and aircraft).

1962—1. TIAS 5255 (Iceland, shipping and aircraft).

1964—1. TIAS 5635 (Mexico, shipping and aircraft).

1972—1. TIAS 7282 (China).

(3) *Taxation, Double—Lease and Operation of Ships or Aircraft.*

Note.—This is an understanding regarding interpretation and application of Article V of the 1954 income-tax convention with Japan with respect to income

from the operation in international traffic of ships or aircraft leased on a bareboat or full basis.

(a) *Authority*—

Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Washington April 16, 1954, TIAS 3176, 6 UST 149.

U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*—1.

1971—1. TIAS 7216 (Japan).

(4) *Treaties—Duration or Territorial Application—Extension*

Notes.—1. Article XXVII of the income-tax convention of 1948 with the Netherlands and Article XXII of the income-tax convention of 1945 with the United Kingdom provide that either Contracting State may, by a written notification to the other, declare a desire for extending operation of the convention in whole or in part to overseas territories, such extension to be effective upon an affirmative response from the other Contracting State. The Netherlands and the United Kingdom gave notifications of a desire to extend operation of the respective conventions to the Netherlands Antilles and certain British territories. After Senate approval of the proposed extensions, the United States responded affirmatively. TIAS 3367 and 4141 contain texts of the notes exchanged.

2. The supplementary protocol of 1965 with Belgium modifying the income-tax convention of 1948 as amended entered into force on August 29, 1966. Article II (5) provides that the protocol shall remain in effect as to income of calendar years or taxable years (or in the case of taxes payable at source, payments made) prior to January 1, 1968, or such subsequent date, not later than January 1, 1971, agreed to by the Contracting States through an exchange of diplomatic notes. TIAS 6394 is an exchange of notes in which the two Governments agree that the protocol shall remain in effect as to income . . . prior to January 1, 1971.

3. Article 5 (3) of the income-tax convention of 1966 with Trinidad and Tobago provides in effect that the convention shall terminate on December 31, 1967, unless the two Contracting States, on or before that date, agree by notes exchanged through diplomatic channels to continue the convention in effect for the following year. By notes exchanged on December 19, 1967 (TIAS 6400) the duration of the convention was continued through 1968, and by notes exchanged on December 31, 1968 (TIAS) the duration was continued through 1969.

(a) *Authority*—

Convention with respect to taxes on income and certain other taxes, with the Netherlands, signed at Washington April 29, 1948, TIAS 1855, 62 Stat. 1757, as supplemented by protocol signed at Washington June 15, 1955, TIAS 3366, 6 UST 3696.

Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, with the United Kingdom, signed at Washington April 16, 1945, TIAS 1546, 60 Stat. 1377, as modified by supplementary protocol signed at Washington May 25, 1954, TIAS 3165, 6 UST 37.

Protocol with Belgium, signed at Brussels May 21, 1965, modifying and supplementing the income-tax convention of October 28, 1968, as amended (TIAS 2833, 4 UST 1647; TIAS 2833, 4 UST 1672; TIAS 4280, 10 UST 1358), for the avoidance of double taxation, TIAS 6073, 17 UST 1142.

Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and the encouragement of international trade and investment, with Trinidad and Tobago, signed at Port of Spain December 22, 1966, TIAS 6400, 18 UST 3091.

U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*—5.

1955—1. TIAS 3367 (Netherlands).

1958—1. TIAS 4141 (United Kingdom).

1967—2. TIAS 6394 (Belgium), 6400 (Trinidad and Tobago).

1968—1. TIAS 6609 (Trinidad and Tobago).

(5) *Treaties—Territorial Application—Dependencies and New States.*

Note.—In normal circumstances, after a treaty or other international agreement has been applied, in accordance with its terms, to dependent overseas territories, it is considered as continuing to apply to such territory after it becomes an independent new state in the absence of action to the contrary by

either or both of the parties concerned (i.e., the United States and/or the new state). The same rule applies where a federated dependent territory is divided into two or more dependent territories (as in the case of the Federation of Rhodesia and Nyasaland, which became Southern Rhodesia, Northern Rhodesia, and Nyasaland). In some cases, it has been considered expedient to exchange diplomatic communications in which the understanding is confirmed with respect to the continuing application. With respect to certain treaties between the United States and the United Kingdom, there have been exchanges of communications with Botswana, Ghana, Kenya, Lesotho, Malawi, and Tanzania, and also an exchange of communications with the United Kingdom in regard to Southern Rhodesia, Northern Rhodesia, and Nyasaland. With respect to certain treaties between the United States and France, there has been an exchange of communications with the Republic of the Congo, Brazzaville. These exchanges do not involve any new commitment.

(a) *Authority*—U.S. Constitution, Art. 11, sec. 1 ("executive Power").

(b) *Agreements*—9.

1967—2. TIAS 6328 (Malawi), 6383 (Lesotho).

(6) *Treaties—Texts—Correction or Interpretation.*

Note.—In a few instances, texts of treaties as prepared for signature have contained errors of a typographical character. In the cases of bilateral treaties, it has been possible for the United States and the other country concerned to exchange notes confirming the understanding with respect to the correction of the errors. In the case of a multilateral treaty, a "proces verbal of rectification" or similar document was adopted. With respect to the 1951 security treaty with Japan and the 1952 administrative agreement under Article III of that treaty, the United States and Japan exchanged notes in 1957 to confirm the understanding that they "were so drafted as to be fully compatible with the obligations contained in the United Nations Charter" and were to be so interpreted. The treaties to which references were made below, in the order in which listed, are:

Estate-tax convention of February 20, 1950 with Greece, TIAS 2901, 5 UST 12;

International Convention on the Safety of Life at Sea, 1948, opened for signature at London June 10, 1948, TIAS 2495, 3 UST 3450;

Security Treaty of September 8, 1951 with Japan, TIAS 2491, 3 UST 3329, and administrative agreement under Article III of that Treaty, TIAS 2492, 3 UST 3341;

Income-tax convention of February 20, 1950 with Greece, TIAS 2902, 5 UST 47;

International Convention for the Safety of Life at Sea, 1960, done at London June 17, 1960, TIAS 5780, 16 UST 185;

Extradition Convention of December 10, 1962 with Israel, TIAS 5476, 14 UST 1707.

(a) *Authority*—U.S. Constitution, Art. II, sec. 1 ("executive Power").

(b) *Agreements*—6.

1954—1. TIAS 3032 (Greece, correction of text of estate-tax convention).

1961—1. TIAS 4951 (Greece, correction of text of income-tax convention).

U.S. INFORMATION AGENCY,
Washington, D.C., April 16, 1972.

Hon. SAM J. ERVIN, JR.,
U.S. Senate.

DEAR SENATOR ERVIN: This letter is in response to your inquiry of March 30, 1972 concerning executive agreements with foreign countries which affect our Agency's operations abroad.

During the recent authorization hearings before the Senate Foreign Relations Committee, we were requested to submit this same information to the Committee Staff. The attached is a copy of our response to the Senate Foreign Relations Committee which I hope will also serve the needs of your subcommittee.

Please note that some of the agreements are classified. These classifications have been applied at the request of the other foreign governments at the time the agreements were negotiated.*

Sincerely,

CHARLES D. ABLARD,
General Counsel and Congressional Liaison.

UNITED STATES INFORMATION AGENCY

OFFICE OF ASSISTANT DIRECTOR FOR AFRICA (IAA)

The United States has a Government-to-Government Cultural Agreement, which affects USIA operations, with only one African country, Guinea. The Agreement entered into force in October 1959. The intent of the Agreement states: "To encourage and facilitate in its territory if it is so desired by both parties the conduct of cultural activities and the establishment of libraries, cultural institutes, or other forms of cultural centers by the other Government."

The United States opened a Cultural Center in Guinea in 1961; Guinea had never indicated an interest in opening one in the United States. In 1966, the Government of Guinea closed down all foreign Cultural/Information Center activity. Since then, USIS has conducted a modified operation as the Cultural Section of the Embassy.

Further, in 1963 and 1965 agreements were signed between USIS Addis Ababa and the Ethiopian Ministry of Education under which USIS undertook to provide the following assistance to existing school libraries or secondary schools in six to eight cities in Ethiopia:

1. book collections supplemented by regular book orders and periodical subscriptions;
2. library furniture and equipment;
3. film projection equipment and collections of USIS documentary films on loan;
4. a trained librarian to operate each library, and library and film projection training for Ministry of Education employees who would be assigned initially as assistant librarians;
5. necessary minor refurnishing of libraries (e.g. painting, cleaning, etc.);
6. cataloguing of library volumes;
7. periodic supervisory visits by trained members of USIS.

The Ministry of Education undertook to provide the following:

1. rent free space and utilities in the secondary schools;
2. the salary and expenses of one assistant librarian;
3. necessary local transport and handling of library materials for libraries;
4. custodial care for the premises so as to maintain a proper appearance.

It was further provided that operation of the library rooms would be turned over to the Ministry of Education at a mutually agreed time, but no sooner than three years from the date of their opening. USIS, however, has continued to operate them in the six cities where the agreements were implemented.

RADIO BROADCASTING FACILITIES AGREEMENT WITH LIBERIA, AUGUST 13, 1959

1. USG authorized to construct and operate radio facilities including transmitters up to 500 KW power each.
2. USG to conduct training program, in order to make maximum use of Liberian Nationals in construction and operation of these facilities.
3. Agreement is effective for 40 years.

OFFICE OF ASSISTANT DIRECTOR FOR EAST ASIA & PACIFIC (IEA)

New Zealand and Australia: Both Posts have contracts with their host countries' respective Postal Departments to monitor the Wireless File since neither Post has the necessary equipment to do so.

Hong Kong: The Cultural Center in Hong Kong is in rented space, separate from the Consulate, and consists of a library and a film screening room. It has a license to operate issued by the Hong Kong Commissioner of Police in 1963

* Note: Confidential materials deleted from the attachments.

and renewed annually since that date. Following is the Post's explanation of the reason for the licensing:

The laws of Hong Kong (Chapter 172, revised 1970, places of public entertainment ordinance) specify in section 4, "It shall not be lawful for any person to keep or use any place of public entertainment without a license to be granted as hereinafter provided. . . ." Such a "place of public entertainment" is defined as "any place on which there is any building, erection or structure, whether temporary or permanent, capable of accommodating the public." The law defines "entertainment" as including "any concert, stage play, stage performance or other musical, dramatic or theatrical entertainment or any part thereof, any cinematographic display, lecture, storytelling, circus, exhibition of pictures, photographs or books," etc., Provisions of the ordinance apply whether or not admission is paid.

The ordinance confers on the Governor power to set standards of construction and interior arrangement, fire and other safety and sanitary standards, and provisions necessary for the maintenance of peace and good order. It also provides for government censorship of all films, posters, pictures, figures and related advertisement texts.

Although the Governor of the colony has power to grant exemptions, provisions of the ordinance apply routinely to all theaters, lecture and exhibit halls and similar public places. USIS has never sought exemption. The USIS Cultural Center was originally licensed in August 1963 and has obtained renewal of the license annually since then. The current license, number 9855 dated 29 July 1971, is endorsed "Licensed for the presentation and carrying on of 'lectures, exhibition of pictures, photographs or books and film shows' subject to the observance of the conditions specified on the permit issued under section 8 of the places of public entertainment ordinance, chapter 172, by the Commissioner of Police on each and every occasion."

The license carries further a printed warning notice as follows: "(a) In addition to this license you are required by section 8 of the places of public entertainment ordinance, cap. 172, to obtain a permit from the Commissioner of Police. It is an offense to advertise, present or carry on any public entertainment without a permit.

"(b) If this license is in respect of a cinematograph display, the film and every poster, picture and figure to be exhibited and the text of every advertisement must be approved for exhibition under the film censorship regulations."

Application of this licensing and permit procedure to the USIS Cultural Center is routine for all public establishments in Hong Kong and is in no way discriminatory.

RADIO BROADCASTING FACILITIES AGREEMENT WITH JAPAN

(Article VIII of the Okinawa Reversion Agreement of June 17, 1971, and subsidiary agreements)

1. Japan agrees to continued operation of VOA station on Okinawa for five years.

2. Japan will reimburse VOA up to \$16 million for actual construction costs of a comparable substitute facility outside Japan.

3. Should unforeseen circumstances prevent completion of construction of a substitute VOA facility outside Japan within the five-year period, Japan will permit VOA Okinawa to continue operation until the substitute facility is completed.

4. USG solely responsible for programs on VOA Okinawa, but Japan has right to express its views on such programs and USG will respect the views so expressed.

RADIO BROADCASTING FACILITIES AGREEMENT WITH PHILIPPINES, MAY 6, 1963

1. USG given right to construct and operate radio broadcasting facilities, including the "new and very powerful radio broadcasting facility envisaged to be constructed under this Agreement" (i.e., Tinang).

2. GOP to have use of USG shortwave facilities at Malolos, Poro, and Tinang without cost, during hours and under conditions to be mutually agreed on.

3. USG to provide training for one-year periods (and salary costs) for two Philippine Nationals nominated by GOP each year.

4. GOP given title to the Guiguinto receiving station and to the Malolos transmitting station.

5. Either Government may terminate upon 18 months' notice; however, such notice cannot be given prior to the date Tinang is operational.

6. If the GOP terminates before Tinang has operated for ten years, GOP will acquire title to Tinang for pro rata share of capital cost. However, USG may remove the transmitters and related equipment and adjust the capital cost accordingly.

7. On termination of the agreement, GOP may negotiate for acquisition of Poro and Baguio stations. Failing a satisfactory negotiation, the USG may remove the facilities from the Philippines.

RADIO BROADCASTING FACILITIES AGREEMENT WITH THAILAND, AUGUST 11, 1965

1. USG authorized to construct and operate megawatt MW station. Costs to be borne by USG except RTG to pay for land, $\frac{1}{2}$ cost of the power substation and power transmission lines, and its proportionate share of the power operating costs.

2. USG and RTG to share use of the megawatt according to time schedule specified in the agreement.

3. RTG given nominal title (for one baht) to megawatt station.

4. USG to provide and install 100 KW MW transmitter, antenna system and related equipment at station to be operated by RTG.

5. USG to assist in upgrading RTG shortwave radio facilities in the amount of \$250,000.

6. Agreement is effective for 15 years after the megawatt operational.

7. During final year of this period, negotiations will be held on extension or changes. If agreement is not reached, agreement can be terminated after 18 month notice, in which case the RTG agrees to sell the megawatt back to USG for one baht.

OFFICE OF ASSISTANT DIRECTOR FOR SOVIET UNION AND EAST EUROPE (IEE)

USSR: Activities under the US-USSR Exchanges Agreement, including exhibits and the distribution of *America Illustrated*, are administered by USIA, although the Agreement does not mention USIA *per se*.

Poland: Distribution of the Polish edition of *America Illustrated* in Poland was arranged by an Agreement between the USA and Poland effected by an Exchange of Notes on May 30, 1958. No other subject was treated in this Agreement.

Romania: An "Understanding" to provide for the establishment and operation of reciprocal library facilities was signed in Bucharest on August 3, 1969.

OFFICE OF ASSISTANT DIRECTOR FOR LATIN AMERICA (ILA)

USIA has no Government to Government agreement in Latin America. In the field USIS administers the activities of the Educational Exchange Agreement in eight South American countries: Colombia, Ecuador, Peru, Chile, Brazil, Paraguay, Uruguay, and Argentina. The Agreements were negotiated by the Department of State with the Governments concerned and signed by U.S. Ambassadors and officials of Foreign Ministries in the countries involved.

OFFICE OF ASSISTANT DIRECTOR FOR NEAR EAST AND NORTH AFRICA (INE)

There is a radio broadcasting facilities agreement with the Government of Morocco providing for the operation of the VOA transmitter station at Tangier.

OFFICE OF ASSISTANT DIRECTOR WEST EUROPE (IWE)

On behalf of USIA the Embassy (USIS) Bonn signed an exchange of letters with the Federal Press Office of the German Federal Republic in 1961 agreeing in principle that the Federal Republic of Germany would provide support toward the continuation of German American Institutes (American Houses) at nine locations in the Federal Republic.

RADIO BROADCASTING FACILITIES "CONSTRUCTION AGREEMENT" WITH BBC
MARCH 10, 1961

1. Agreement by BBC for it to modernize the Woofferton shortwave station, on a cost-reimbursable basis by installation of 6 250 KW SW transmitters (replacing 4 existing 50 KW), provision of new RF switchgear and certain new antennas, and modification of certain existing antennas.

2. USG has primary use of new transmitters for initial ten year period, then for two optional additional periods of five years each, and thereafter until agreement terminated. BBC has use of new transmitters outside the period of USG use.

3. Title to new equipment retained by USG until modified plant operational tax years, after which title passes to BBC.

4. Provision made for title acquisition by BBC and cost settlement if agreement terminated for any reason before end of initial ten year period.

RADIO BROADCASTING FACILITIES AGREEMENT WITH FEDERAL REPUBLIC OF GERMANY
JUNE 11, 1952

1. USG authorized to operate ARBIE (American Radio Bases in Europe) and RIAS-Hof, in accordance with an annex of operating conditions.

2. Agreement may be terminated on one-year notice.

OFFICE OF ASSISTANT DIRECTOR FOR SOUTH ASIA (ISA)

Afghanistan: 1958 Afghanistan-USG Cultural agreement which allows a conduct of cultural activities, establishment of libraries, cultural institutes, and other forms of Cultural Centers by each government. Agreement signed by Secretary of State Dulles and HRH Sadar Mohammad Daud, Prime Minister of Afghanistan.

India: Government of India has given approval for USG to make grants to two Book Corners (small reading rooms) in city and state libraries; Grant #1 is to Kanpur Public Library totalling \$3,775 in rupees and covers operation and maintenance of reading room plus subscriptions to selected American periodicals. Grant #2 is made to Shillong, Assam State Central Library, Ganhati for a total of \$3,456 in rupees and contains same provisions as Grant #1.

The second type of agreement is the Joint Indian-American Textbook Program. It is the result of an Aide Memoire from the GOI Ministry of Education to USIS New Delhi requesting assistance in the textbook program. Policies of the program are formulated by a joint Indian American Textbook Board. The chairman is the Secretary of the Ministry of Education. The Board's secretary is the USIS Books Program Officer. Other members represent the GOI Ministries of External Affairs, Finance, and Education. USG is further represented by the Cultural Affairs Officer and the AID Education Division Chief. All book titles printed must have the approval of the GOI Ministry of Education. FY 72 USIS program contribution is estimated at \$500,000 in rupees and the AID Program contribution is estimated at two million dollars in rupees.

Pakistan: USIS Islamabad reports that through exchanges of notes the Government of Pakistan granted permission for the operation of USIS Information Centers at Hyderabad and Peshawar in June 1957. The Cultural agreement of 1950 (as amended) with Pakistan was negotiated by Department of State.

Nepal: Neither USIS or the Embassy in Kathmandu have records of any written agreements concerning USIA operations or facilities in Nepal. The American Library was opened in 1952, before establishment of the Embassy in 1959. Permission to open in 1952 was negotiated by USG representatives resident in India and accredited to Nepal. The U.S. Education Foundation agreement was negotiated through the Department of State.

RADIO BROADCASTING FACILITIES AGREEMENT WITH CEYLON, APRIL 26, 1971

1. Extends to May 14, 1976, the previous agreement under which three 35 KW shortwave transmitters and a receiving station were installed by USG.

2. Operation of station by GOC on reimbursable basis, but USG keeps Resident Engineer as consultant.

3. USG has primary use of two transmitters and the receiving station, secondary use of the other transmitters.

4. Title to transmitters nominally vested in GOC but may be regained by USG on termination by payment of one rupee; title to receiving equipment regained on termination.

5. On final termination, GOC has option to negotiate for transmitting equipment; if not exercised or fail to agree, equipment returned to USG for one rupee, to be exported duty free within six months and premises restored at USG expense. As to the receiving station, on final termination USG regains title to equipment and may remove duty free. GOC will acquire the land and buildings at a negotiated price.

MYRES S. MCDUGAL, STERLING PROFESSOR OF LAW, YALE LAW SCHOOL

(Excerpt from letter of April 12, 1972, to Chairman, Senate Subcommittee on Separation of Powers)

On the basis of my studies of thirty years ago I would be dubious whether we should seek a clearer definition of the powers, duties, and prerogatives of the two branches of the government" with respect to the making of international agreements. The initial grants of competence to the Senate, the whole Congress, and the President were deliberately made overlapping in their reference to secure the advantages of a separation and balancing of powers, which include the maintenance of initiative and flexibility as well as protection of freedom. The founding fathers thought it most unwise to try to anticipate the exigencies of an uncertain future and specify in detail what could be done through the three different routes to the making of international agreements. Though I haven't closely followed the details of recent practice, it seems to me that all branches of our government have down through the decades interpreted and applied the broad, overlapping grants of competence in a way to secure a highly effective balancing of powers which has served the common interest well. Certainly the exigencies of the future we face are no less than those the founding fathers faced, and both initiative and freedom remain important for us.

With respect to how a clearer definition might be made, I don't believe any one branch of the government presently has the constitutional competence to regulate how another branch exercises its independent competence to make agreements. The very notion of a separation and balancing of constitutional powers means that no one branch has such a monopoly of the agreement-making power. Hence, any new and clearer definition, if one is desirable and possible, would have to be made by constitutional amendment. As indicated, I have very grave doubts whether such a definition is either desirable or possible.

[From the Yale Law Journal vol. 54, No. 3, June 1945]

TREATIES AND EXECUTIVE AGREEMENTS—A REPLY

(By Edwin Borchard)

TREATIES

1. A treaty, as is evident from *Missouri v. Holland*, is like a constitutional amendment. It can deal with any subject appropriate to international negotiation.

2. A treaty can do what Congress cannot. It confers legislative power on Congress (*Missouri v. Holland*).

EXECUTIVE AGREEMENTS

An executive agreement is strictly limited. It can deal only with subjects especially delegated by Congress or, if made independently by the President, can deal only with normal powers vested in the Commander-in-Chief and principal diplomatic officer.

An executive agreement cannot do what Congress cannot. It cannot confer on Congress powers of legislation it did not have before.

3. A treaty must be ratified to be binding, according to American practice. An executive agreement need not be ratified by the United States.
4. A treaty, as its name indicates, binds the United States for its duration. It cannot be repealed by act of Congress except for domestic purposes only. The international obligation remains binding. An executive agreement, as its name indicates, "binds" only as long as it suits *both* sides. It morally "binds" only the signing Executive, not his successors. If they wish it to continue, it is by voluntary act. An executive agreement is subject to repeal by act of Congress domestically and internationally. Unilateral indication of desire to terminate suffices. Repeal of authorizing statute suffices.
5. A treaty has a special significance in constitutional law. It can repeal an act of Congress. An executive agreement is unmentioned in the Constitution and has grown only through the necessity of making agreements of a character not to warrant submission to the Senate. It can be repealed by Congress at any time, but cannot repeal an act of Congress. It can of course be nullified or abrogated by treaty, prior or subsequent.
6. A treaty, by the Constitution, is the "supreme law of the land." An executive agreement, with a few exceptions as to contrary state law or when made pursuant to act of Congress, is not supreme law of the land.
7. Only a new treaty can alter or modify an earlier treaty. An executive agreement cannot alter or modify a treaty.
8. A treaty is submitted to the Senate for formal consideration and consent, rejection, amendment or reservations. An executive agreement is not "submitted" to Congress for consideration or for approval, rejection, amendment or reservations. There is no procedure for subsequent approval, sanction or ratification by Congress.
9. A treaty lasts, with unimportant exceptions, as long as its terms provide. An executive agreement is terminable at any time at the unilateral wish of one of the parties. This is true even if it purports to run for a given number of years. No successor to the President is bound by the latter's agreement, although he may consent to permit it to stand.
10. No secret treaty can be made by the United States. Treaties must be published. An executive agreement invites secrecy since the President can make it without notifying anybody. Several secret agreements are now known.

UNIVERSITY OF VIRGINIA,
SCHOOL OF LAW,
Charlottesville, Va., May 15, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: During my testimony before the Subcommittee on Separation of Powers on the subject of Executive Agreements and Congressional-Executive Relations," the Subcommittee expressed particular interest in the interrelation between the "necessary and proper" clause of Article I, section 8 and the principle of separation of powers. In view of the interest of the Subcommittee and the importance of the issue for appraising the constitutionality of legislation pending before the Subcommittee I have prepared the following short statement for the record.

Article I, section 8 of the Constitution provides after enumerating the Congressional powers that "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." There was little discussion of this clause at the Constitutional Convention. In the absence of such discussion the principal evidence of the purpose of the clause is provided by Alexander Hamilton, writing in *The Federalist*:

This clause is only declaratory of a truth which would have resulted by necessary unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers. . . . A power to lay and collect taxes must be power to pass all laws necessary and proper for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might in the execution of that power, pass all laws necessary and proper to carry it into effect? I have applied these observations thus particularly to the power of taxation because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result, in relation to all other powers declared in the Constitution. And it is expressly to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all necessary and proper laws. If there is anything exceptionable, it must be sought for in the specific powers upon which this general declaration is predicted. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless. But suspicion may ask, why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The convention probably foresaw what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the state governments will finally rap the foundations of the Union; and might, therefore, think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evidence from the cry which has been raised against it; as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare." [THE FEDERALIST, No. XXXIII.]

As the lack of discussion at the Convention strongly suggests and Hamilton's statement makes clear, the "necessary and proper" clause was not intended as an additional grant of power to the Congress vis-à-vis the Executive but was intended to make clear that federal authority vis-à-vis state authority included broad power "to make all laws which shall be necessary and proper for carrying into Execution" the powers vested in the federal government. It would have been extraordinary indeed if the framers had intended the "necessary and proper clause" to sweep aside the carefully and deliberately established separation of powers between Congress and the Executive in favor of complete Congressional supremacy. Such an interpretation is completely inconsistent with, for example, the discussion at the Convention of Executive and Congressional authority with respect to hostilities, and the careful delineation in Arti-

cle II between those Executive powers which were exercisable only with Congressional or Senate concurrence and those which were exercisable on independent Executive authority. In the absence of any discussion indicating that the framers intended to reverse their carefully thought-out decisions to give the President authority, for example, as Commander-in-Chief to conduct hostilities, or as chief representative of the nation in foreign affairs to "receive Ambassadors and other public Ministers" it would be startling if the framers intended these powers to be limited at the will of Congress.

Not surprisingly, there has never been a judicial decision which has held that "the necessary and proper" clause was intended to limit the principle of separation of powers. To the contrary, the clause would seem as subject to that principle as any of the enumerated grants of power to the Congress. And not surprisingly, a long series of Supreme Court decisions, including at least one direct holding, has held that there are areas of exclusive Executive authority as to which Congress is powerless to encroach.

In *Myers v. United States*, 272 U.S. 52 (1926), Chief Justice Taft, writing for the Court, held that "the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate," and that Congress was powerless to condition the President's removal power on the concurrence of the Senate. Specifically:

"[W]e must therefore hold that the provision of the law of 1876, by which the unrestricted power of removal of first class postmaster is denied to the President, is in violation of the Constitution, and invalid." *Id.* at 176.

The parallel between the *Myers* case and the constitutional issues presented by S. 3475 are striking. In both cases the issue is whether Congress can condition the exercise of an independent Executive power on Senate or Congressional concurrence. In the *Myers* case the Court held that the President had independent authority to remove executive officers appointed by and with the consent of the Senate. That removal authority could not be restricted by Congress. And in considering the constitutionality of S. 3475, a long line of Supreme Court decisions has upheld the independent authority of the President to enter into executive agreements incident to other Executive powers. In view of the greater authority of the President in foreign affairs, it would seem that there is a considerably stronger case for saying that Congress could not limit the President's authority to enter into executive agreements than was present in the *Myers* case. It should also be pointed out that the President's removal power at issue in the *Myers* case was, like the President's executive agreement power, an implied power. The holding of the case, then, was not predicated on a specific clause of the Constitution inconsistent with legislation under the "necessary and proper" clause, nor did the Court make any distinction between substantive and procedural powers. Following the *Myers* case, it is clear beyond peradventure that it is an inadmissibly narrow conception of the Constitution to urge that the "necessary and proper" clause permits Congress to limit constitutionally derived Executive powers.

In addition to the *Myers* case, a variety of other Supreme Court pronouncements have made it clear that there is a range of exclusively presidential powers as to which Congress is powerless to encroach. In *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), Chief Justice Chase pointed out that Congressional authority did not extend to interference with command decisions. According to the Chief Justice, Congressional authority

"necessarily extends to all legislation essential to the prosecution of war with vigor and success except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President a commander-in-chief. . . . [N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. *Id.* at 139 (Opinion of the Chief Justice and Justices Wayne, Swayne and Miller)."

In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), Mr. Justice Sutherland, writing for the Court, said:

"Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold prob-

lems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. *Id.* at 319."

And although a divided Court held in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that the President's authority as Chief Executive and Commander-in-Chief did not extend to seizure of steel mills threatened with a strike during the Korean War, all of the opinions assumed that in areas of exclusive Executive authority even Congress would be powerless to encroach on Presidential authority. For example, Mr. Justice Frankfurter said: "I shall not attempt to delineate what belongs to him [the President] by virtue of his office beyond the power even of Congress to contract." And Mr. Justice Jackson said in enumerating three groupings concerning Presidential power:

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

If, of course, the "necessary and proper" clause permitted all encroachments on independent Executive authority there would have been no need for Mr. Justice Jackson to separately list this third category or to consider, as he did, whether it was factually present in the case.

In summary, the history of the "necessary and proper clause" and subsequent Supreme Court decisions leave no doubt that the clause does not provide a basis for setting aside the separation of powers principle or for encroaching on areas of exclusive Executive authority under the Constitution. To the contrary, the separation of powers principle has consistently been vigorously defended by the Court. Since *S. 3475*, in attempting to condition all executive agreements on prior Congressional concurrence (or at least on the absence of Congressional disapproval), attempts to limit at least some agreements concluded pursuant to powers exclusively Presidential, the proposed Bill would seem to be clearly unconstitutional.

There are, of course, some areas under the Constitution in which the President has independent but not exclusive authority. That is, areas where the President has authority to act without Congressional authorization but where Presidential action must yield to inconsistent legislation. Although not clear, this may be the case for some kinds of "presidential agreements." If so, Presidential authority would yield in such areas to specific Congressional action. Nevertheless, it seems questionable whether even in these non-exclusive areas Congress could enact legislation which would sweepingly condition such independent powers on prior Congressional concurrence. Such an act would be tantamount to redrawing the constitutional lines to change independent Presidential power into a joint Executive-Congressional power similar to the joint Executive-Senate power to appoint Ambassadors. As Chief Justice Taft makes clear in the *Myers* case, Congress does not have the authority, absent a constitutional amendment, to alter the constitutional division of authority between the Congress and the President or to define the constitutional boundaries between the three branches:

"A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government desired by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. 272 U.S. at 127."

Thus, even aside from interference with executive agreements incident to exclusively Presidential powers—and it is not clear that all "presidential agreements" validly concluded within the President's authority are not within an area of exclusive Presidential authority to initially conclude such agreements—*S. 3475* is constitutionally questionable in attempting to change the independent "presidential agreement" power into a power dependent on Congressional concurrence.

It was a pleasure to appear before the Subcommittee and if I can be of further assistance in your efforts to improve Congressional-Executive relations in foreign affairs, please call on me.

With warm regards.

Sincerely,

JOHN NORTON MOORE,
Professor of Law.

HAS OUR GOVERNMENT BECOME AN ELECTIVE MONARCHY?

(George M. Montross)

The Constitution is not merely a lawyer's document to be argued about in a court of law. It is a people's document of vital importance in preserving liberties and responsibilities it provides for, and the people would do well to review from time to time the course of government to determine how performance compares with the specifications.

The authors of the Constitution expressed in debate abhorrence of the President functioning as an elective monarch—who, though elected, would wield the powers that monarchs of the time exercised (not the mere figure-heads of today)—and imposed restrictions as safeguards to protect the people against the evils of one-man government. Although all officials, including the President, members of Congress and of the courts, are under oath to observe and abide by the terms of the Constitution, all three branches have wilfully ignored vital restraints and limitations with the result that if today we do not have an elective monarch in the Presidency, we have something very close to it. *Mere existence of a Constitution on paper does not insure constitutional government; that depends upon observance.*

The safeguards dealt with here concern the limitations on the powers of the President as Commander-in-Chief of the Army and Navy and to make commitments to foreign nations.

COMMANDER-IN-CHIEF OF THE ARMY AND NAVY

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States," declares the Constitution.

But that provision is modified by conferring upon Congress the powers "to declare war" and "to make rules for the government and regulation of the land and naval forces." If the clear, definite and unambiguous language employed requires explanation, it was supplied by Alexander Hamilton in *Federalist Paper No. 69*:

"The President is to be Commander-in-Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy, while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature."

In brief, the people were not to be thrust into a war on the determination of one man; they were to have the benefit of the judgment of their many representatives.

Under the Articles of Confederation, from which the authority "to make rules for the government and regulation," etc., was transferred to the Constitution, the appointment of a "Commander-in-Chief of the army or navy" was provided for. It could not be contended that such an appointed personage, with the overhanging power of Congress to govern and regulate, would have complete control of the armed forces. It was only this authority possessed by such an appointee that was transferred to the President, and no more. He is subject to the authority of Congress.

The power to declare war is the power to initiate it. The fact that at this time war may be begun without a declaration does not lessen the power and the duty of Congress to make the decision.

The power "to make rules for the government and regulation of the land and naval forces" is a very broad power which vests in Congress control of the military forces, including their commander-in-chief.

It is unfortunate that Congress has failed to enact general rules under which the President could lawfully take military action to protect the lives and property of United States citizens while in other countries, because the many times such actions have occurred have been without congressional authority, have become commonplace and given rise to the unwarranted assumption that the President has unlimited military power. Nowadays the President is frequently referred to as the "Commander-in-Chief," omitting the qualifying words "of the Army and Navy," which could give the impression that he is Commander-in-Chief of the Government. It should be borne in mind the President is under oath to "preserve, protect, and defend the Constitution of the United States"—the Constitution as written, not deviations from it. This is not accomplished by violation.

Early in his administration, President Eisenhower expressed recognition of constitutional military limitations by stating he would not take the nation into a war without congressional authorization. This was in contrast to the course pursued by President Roosevelt, who involved the United States in World War II long before the tragic event at Pearl Harbor—not only without congressional permission but in violation of the Lend-Lease Act provision (inserted against presidential wishes) that "Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States."

President Roosevelt directed that convoying operations be carried on, seeking to disguise them by deceitfully using the word "patrolling" to describe the program, during the course of which United States destroyers were damaged or sunk with serious loss of life. Secretary of War Stimson recorded in his diary under date of April 24, 1941, after conferring with the President:

"He kept reverting to the fact that the force in the Atlantic was merely going to be a patrol to watch for any aggressor and to report that to America. I answered there, with a smile on my face, saying, 'But you are not going to report the presence of the German Fleet to the Americas. You are going to report it to the British Fleet.' I wanted him to be honest with himself. To me it seems a clearly hostile act to the Germans, and I am prepared to take the responsibility of it. He seems to be trying to hide it into the character of a purely reconnaissance action which it really is not." *

President Eisenhower confirmed his early statement by requesting Congress to authorize him to use the armed forces in connection with the defense of Formosa, and later making the same request in regard to the Middle East. In the case of Formosa, Congress complied by adopting the resolution:

"That the President of the United States be and he hereby is authorized to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack. . . ."

However, when it came to the Middle East, although the House of Representatives adopted a resolution of authorization, some Senators demurred, contending without warrant that military action was the responsibility of the President alone, ignoring the power of Congress to govern and regulate the land and naval forces, as well as to decide whether or not the nation was to be involved in war. The result was that the resolution as finally adopted was diluted to the nebulous and enigmatic declaration:

"Furthermore, the United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism; Provided, That such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States."

This was not saying the President's determination was to be or could be acted upon, but only that the United States was "prepared to" act. The President was even warned by the proviso "That such employment shall be consonant with the . . . Constitution of the United States." Although it was not an authorization and not intended to be,—actually incomplete and inconclusive—President Eisenhower later did send troop into Lebanon.

* On Active Service in Peace and War, Harper & Brothers, pp. 368-9.

Congress has authorized the President to draw upon the armed forces for personnel to assist other countries in noncombatant capacities only, including advising and training. For this purpose a contingent of United States troops was stationed in South Vietnam. After a time, without further congressional authorization and only with the sanction of successive Presidents, advisers were assigned to the battle line armed with guns and hand grenades and thus, by becoming participants in battle with South Vietnamese troops, ceased to have the noncombatant status required by law. Likewise United States planes manned by United States pilots were engaged in transporting South Vietnamese troops to battle areas.

In pursuing these activities, more than 100 were killed and many more wounded before full scale military operations began with the North Vietnamese torpedo boat attack against a United States destroyer patrolling the Gulf of Tonkin. The destroyer, maneuvering so as to avoid the torpedo, which it succeeded in doing, responded by sinking the attacking boats. Later war planes of the United States raided North Vietnam, causing loss of life and destruction of property.

President Johnson called the raid retaliation for the torpedo attack on the destroyer and asked Congress for support of his action, saying he did not ask for authority, which he claimed he already possessed, but wished to show the world that he had the support of Congress.

The claim that the raid was in retaliation was untenable because retaliation had already taken place by the destroyer sinking the torpedo boats. The attack on North Vietnam was an unauthorized act of war. A resolution of support was adopted by Congress without consideration of the merits, but based almost entirely upon an emotional urge to uphold the President at any cost. The resolution followed the incomplete and inconclusive formula that "the United States is prepared to take all necessary steps," etc., merely declaring a state of preparation.

It is noteworthy that the Majority Leader of the Senate, Senator Mansfield, who proposed a resolution of authorization originally, and the Chairman of the Senate Committee on Foreign Relations, Senator Fulbright, who voted for the resolution as finally adopted, are among the increasing number who, on sober second thought, have expressed themselves in terms indicating that their support is less than enthusiastic.

Action first by the President and consultation with Congress afterward, under the circumstances presented, is the very opposite of constitutional procedure.

FOREIGN COMMITMENTS

The President is restricted in dealing with other nations. The Constitution provides:

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, . . ."

Except for ability to "receive ambassadors and other public ministers," the President is hedged in by restraints. Nowhere in the Constitution is to be found authority for the President by himself alone to commit the nation to any international undertaking. That may be done only by treaty duly approved by the Senate, or by act of Congress where a treaty is not involved.

When the Constitution is definite and precise regarding a procedure to be followed, it thereby is saying no other method is permissible. When the Constitution says "No," the Supreme Court has no authority to say "Yes."

Yet the Supreme Court has presumed to hold that a different method is permissible, i.e., the President alone may, without restriction, make treaties. The attitude of the Court has been stated in the determination of several cases, one of which is *United States v. Belmont* (301 U.S. 324, 1937), from which the following excerpts are taken:

"Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government."

There is nothing in the Constitution from which it can be inferred that the President is "the sole organ" of the United States in relation to treaties,

Further:

"We held (in *Altman & Co. v. United States*, 224 U.S. 583) that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a 'treaty' within the meaning of the Circuit Court of Appeals Act, the construction of which might be reviewed upon direct appeal to this Court."

The words "under the authority of the President" in relation to such a compact are unknown to the Constitution.

The Circuit Court of Appeals had previously held in the Belmont case "that a judgment for the United States could not be had, because . . . it would be contrary to the controlling public policy of the State of New York." On this feature the Supreme Court went on to say:

"Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective."

Madison, in the Virginia Convention, was speaking about the Constitution as then proposed and could have been referring, therefore, only to a treaty made in accordance with the constitutional provision, and in that respect his statement was sound. That was not the situation with which the Court was dealing, however.

Continuing:

"And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. Cf. *Missouri v. Holland*, 252 U.S. 416; *Asakura v. Seattle*, 265 U.S. 332."

The argument would be appropriate as to a treaty approved by the Senate, but the "treaty" then under consideration was not such a one; it was made by the President alone, contrary to the Constitution. Clearly the Court accorded the "treaty" in question the same degree of validity as that possessed by a regular treaty, even to the extent of overriding state constitutions and state laws. To complete the incongruity, the Court looked for support to the two cases cited, which involved treaties constitutionally made.

After World War II, Status-of-Forces treaties were made with Western European nations, whereby United States soldiers charged with crime against nationals of the nation concerned would be tried in that nation's courts, which treaties were submitted to and approved by the Senate. Afterward the President alone made a similar arrangement with Japan, which on coming before the Supreme Court was held to be a valid treaty.

Thus it is seen that the Supreme Court gives a presidential international "commitment" exactly the same standing as a treaty made in accordance with the Constitution. It must follow that a President may choose which method to pursue. He may perfunctorily refer a proposed treaty to the Senate, or if there should be doubt about Senate approval, or for any other reason, he may complete the transaction by himself. The Supreme Court would make a nullity of the treaty-making provision of the Constitution.

The Court cannot be said to have been "interpreting" the treaty provision, because that provision is a direction stated in such precise terms that interpretation is neither called for nor permitted. The Court has in fact been acting in defiance and violation of the Constitution.

The Supreme Court is not infallible. It concedes this when on occasion it overrules its own previous decisions. Nor is the Constitution "what the judges say it is;" it is what it itself says it is. A Supreme Court decision is not the "supreme law of the land." The Constitution states it thus:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; . . ."

Treaties, to be valid, must be made "under the authority of the United States,"—in conformity with the Constitution—not "under the authority of the President."

The Supreme Court is subordinate to the Constitution, not superior to it. Its members recognize this when they swear fealty upon taking office; but it is apparent that in relation to treaties, at least, they have presumed to place themselves above the Constitution when they arbitrarily accord to the President alone the power to make treaties. The Court is without authority to amend, nullify, remake or ignore any part of the Constitution.

CONCLUSION

All is not well with our Republic. The Executors of the Constitution have wandered far afield in conducting the affairs of government in at least two very vital aspects and must be headed off if constitutional government is to be restored. A President ambitious for power will not suffer limitation. The Supreme Court offers no hope. The task, then, devolves upon Congress, even though its tendencies toward weakness do not inspire great confidence.

It would be incumbent upon Congress to divest itself of the idea that a President can do no wrong; its members must be brought to realize that their allegiance is to the Constitution representing the people—not to the President. They must face up to the responsibility conferred upon them by the Constitution.

The impeachment provision is available. Either one or both Houses could correct the situation by refusing to implement in the slightest degree unauthorized military action and spurious treaties. If this or other measures having the same effect are not taken, the Constitution will be a shambles and we shall indeed have an elective monarchy with the President wielding unlimited power.

Madison recorded the view of Hugh Williamson, of North Carolina, as expressed in the Constitutional Convention, thus:

"Another objection against a single magistrate is that he will be an elective king and will feel the spirit of one. . . . It was pretty certain, he thought, that we should at some time or other have a king, but he wished no precaution to be omitted that might postpone the event as long as possible."

Do we care enough to "postpone the event as long as possible" in our time, or shall we just permit the trend to continue?

[From the 91 Congressional Record 4965, May 24, 1945]

PROPOSED CONSTITUTIONAL AMENDMENT RELATING TO THE MAKING OF TREATIES

Mr. PEPPER. Mr. President, on the 1st of May the senate of the State of Florida and on the 2d of May the house of representatives of the State of Florida adopted a resolution which I believe will have historic significance. It was an application to the Congress under article v of the Constitution. It is very brief and reads as follows:

Be it resolved by the Legislature of the State of Florida:

SECTION 1. That in accordance with article 5 of the Constitution of the United States of America the legislature of the State of Florida does hereby make application to the Congress of the United States to call a Constitutional Convention for proposing an amendment to the Constitution of the United States by adding thereto an article providing substantially as follows:

"ARTICLE —

"Hereafter treaties shall be made by the President by and with the advice and consent of both Houses of the Congress."

SEC. 2. That a duly authenticated copy of this resolution be transmitted by the secretary of state of the State of Florida to the President pro tempore of the United States Senate, and to the Speaker of the House of Representatives of the United States.

Mr. President, I issued a public release in comment upon the adoption of the resolution by the Florida Legislature, which I ask unanimous consent to have incorporated in the body of the RECORD at this point in my remarks.

There being no objection, the release was ordered to be printed in the RECORD, as follows:

The Legislature of Florida, upon my recommendation, has just done something historic; something to help prevent War III.

By a resolution passed last week the legislature made Florida the first State in the Union to set in motion the machinery to change the Constitution of the United States so that treaties may be made by agreement of both Houses of Congress rather than by two-thirds of the Senate.

At present the House of Representatives, the body in the Congress closest to the people, is necessary to a declaration of war. But it has no part in making a treaty of peace or in our joining an international organization to keep the peace. Only the Senate has anything to say about that.

But even the Senate cannot agree to a treaty or to any organization like the United Nations unless two-thirds of the Members of the Senate present when such a matter is considered agree to such proposal. That provision defeated the League of Nations and contributed to the present awful war. For there is no doubt that a majority of the Senate and the House of Representatives would have agreed to the League of Nations as recommended by President Wilson if they had had the power to do so.

This two-thirds rule gives as few as 17 Senators the power to defeat a treaty. Thirty-three Senators could do it at any time.

That means that after the United Nations organization is set up at San Francisco by representatives of all the United Nations a third plus one of the Senate can keep us out of that organization. A third plus one of the Senate could keep us out in spite of the people overwhelmingly favoring our getting in and helping to keep world peace. This third, plus one, of the Senate could keep us out of the United Nations in spite of as many as 63 of the Members of the Senate favoring our taking an honorable part in that effort to prevent war.

The time has come, therefore, to modernize our peace-making and peace-keeping machinery.

Both Houses of Congress represent the people; both Houses declare war; both Houses have to pass legislation which is usually necessary to carry out any treaty we make; both Houses have to make any appropriations necessary to carry out any treaty. Both Houses, therefore, should speak for the people in making agreements with other nations, not just two-thirds of the Senate, whose Members are not answerable to the people except every 6 years.

And both Houses of Congress should act in making treaties as they act in declaring war or in passing all legislation, by a majority vote in each House. That is democracy. Then no other little group of willful men can throw away another peace as they did after the last war.

The Florida resolution is in the exact language of the resolution passed by the House in Washington, of which Chairman HATTON SUMNERS, of Texas, of the House Judiciary Committee is author.

It provides:

"Hereafter treaties shall be made by the President by and with the advice and consent of both Houses of the Congress."

The House resolution of Mr. SUMNERS cannot be submitted to the States by the Congress without the concurrence of the Senate by a two-thirds vote, and I doubt if the Senate will, of its own accord, give up its exclusive power to ratify treaties.

Hence the only way we can hope to strike down the two-thirds rule of the Senate is for 32 States to ask Congress to call a convention for proposing this amendment to permit both Houses of the Congress to ratify treaties.

Florida has shown the way and now if 31 other States will follow her lead we can enable our Government to keep faith with our honored dead and to help to save the peace for which he gave "the last full measure of devotion."

All honor to the vision of the Florida Legislature. The Nation will expect other legislatures, most of which are meeting this year, to follow Florida.

[From the 98 Congressional Record 1057, 1952]

Concurrent resolution of the Legislature of the State of Georgia; to the Committee on the Judiciary:

"Whereas the Constitution of the United States provides that treaties made under the authority of the United States shall, along with the Constitution and Laws of the United States, be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding; and

"Whereas the treaty-making power is, with increasing frequency, being resorted to for the purpose of empowering Congress to enact, by way of implementing treaties, laws which Congress would otherwise be without power to enact; and

"Whereas the effect of this provision of the Constitution of the United States is to enable the President, with the consent of two-thirds of the Senate, to change the Constitution of the United States and enlarge the powers of the Congress by conferring upon the Congress power to enact laws to implement and enforce such treaties; and

"Whereas the practice, if continued, could well result in complete destruction of the States and in gross invasions of the rights of the citizens of the United States; and

"Whereas such a condition is extremely dangerous and undesirable: Now, therefore, be it.

"Resolved by the General Assembly of Georgia, That the Congress of the United States be hereby requested to call a convention for the purpose of proposing an amendment to article VI, clause 2 of the Constitution of the United States relating to the treaty-making power and that it be amended in the following respects:

"1. To provide that a treaty shall not become the supreme law of the land upon ratification except to the extent that it shall thereafter be made so by act of Congress;

"2. To provide that in legislating to give effect to treaties Congress shall make no law not otherwise authorized by the Constitution; and

"3. To provide that the basic structure of the United States Government as now embodied in the Constitution, the express limitations of the Constitution on the powers of Congress, the guarantees of rights and freedoms contained in the Constitution and the Bill of Rights, and the powers reserved to the States and to the people, shall not be in anywise altered by any treaty or executive agreement nor otherwise than by constitutional amendment; be it further

"Resolved, That the Congress of the United States be, and it hereby is, requested to provide as the mode of ratification that said amendment shall be valid to all intents and purposes, as part of the Constitution of the United States, when ratified by the legislatures of three-fourths of the several States; and be it further

"Resolved, That a duly attested copy of this resolution be immediately transmitted to the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States, and to each Member of the Congress from this State.

"FRED HAND,

"Speaker of the House.

"JOE BOONE,

"Clerk of the House.

"S. MARVIN GRIFFIN,

President of the Senate.

"GEORGE D. STEWART,

"Secretary of the Senate.

"Approved this 29th day of January 1952.

"HERMAN E. TALMADGE,

"Governor."

[From the 103 Congressional Record 6473, May 8, 1957]

"HOUSE ENROLLED CONCURRENT RESOLUTION 4

"A concurrent resolution making application to the Congress of the United States pursuant to article V of the Constitution of the United States for a convention proposing an amendment to the Constitution of the United States

"Be it resolved by the House of Representatives of the General Assembly of the State of Indiana (the Senate concurring)—

"SECTION 1. The General Assembly of the State of Indiana, pursuant to article V of the Constitution of the United States, hereby makes application to the Congress of the United States to call a convention for proposing the following article as an amendment to the Constitution of the United States:

"ARTICLE

"SECTION 1. A provision of a treaty or other international agreement not made in pursuance of this Constitution shall have no force or effect. This sec-

tion shall not apply to treaties made prior to the effective date of this Constitution.

"SEC. 2. A treaty or other international agreement shall have legislative effect within the United States as a law thereof only through legislation, except to the extent that the Senate shall provide affirmatively, in its resolution advising and consenting to a treaty, that the treaty shall have legislative effect.

"SEC. 3. An international agreement other than a treaty shall have legislative effect within the United States as a law thereof only through legislation valid in the absence of such an international agreement.

"SEC. 4. On the question of advising and consenting to a treaty, the vote shall be determined by yeas and nays, and the names of the Senators voting for and against shall be entered on the Journal of the Senate."

"SEC. 2. The State of Indiana requests that such amendment shall be valid to all intents and purposes as part of the Constitution of the United States when ratified by the legislatures of three-fourths of the several States.

"SEC. 3. For the reason that the power of the sovereign States to propose amendments to the Constitution of the United States by convention under article V has never been exercised and no precedent exists for the calling or holding of such convention, the State of Indiana hereby declares the following basic principles with respect thereto: that the power of the sovereign States to amend the Constitutions of the United States under article V is absolute; that the power of the sovereign States to propose amendments to the Constitution by convention under article V is absolute; that the power of the sovereign States extends over such convention and the scope and control thereof and that it is within their sovereign power to prescribe whether such convention shall be general or shall be limited to the proposal of a specified amendment or of amendments in a specified field; that the exercise by the sovereign States of their power to require the calling of such convention contemplates that the applications of the several States for such convention shall prescribe the scope thereof and the essential provisions for holding the same; that the scope of such convention and the provisions for holding the same are established in and by the applications therefor by the legislatures of the two-thirds majority of the several States required by article V to call the same, and that it is the duty of the Congress to call such convention in conformity therewith; that such convention is without power to transcend, and the delegates to such convention are without power to act except within, the limitations and provisions so prescribed.

"SEC. 4. The State of Indiana requests that such convention shall be called and held in conformity with the following limitations and provisions, and that the Congress, in the call for such convention, hereby is requested to and shall prescribe:

"1. That such convention shall be held in the city of Philadelphia, in the State of Pennsylvania, on the first Monday of the first December following transmission to the Senate and the House of Representatives of the Congress of the United States of applications for such convention by the legislatures of two-thirds of the several States and, in honor of the Nation's founders and for invocation, shall convene at Constitution Hall, at Independence Square, at the hour of 10:00 o'clock in the morning of such day, and thereupon adjourn to more commodious quarters within said city for session as the convention shall determine;

"2. That the several States shall have equal suffrage at such convention; that each of the several States shall be entitled to three delegates thereat and that each of such delegates shall be entitled to one vote; that the delegates to such convention from the several States shall be the highest officer of the senate and the highest officer of the house of representatives of their respective legislatures at the time of such convention, except that in States where the lieutenant governor is president of the senate, the president of the senate pro tem or other highest officer from the membership of the senate shall be such delegate from the senate and in States having a unicameral legislature the two highest officers of its legislature shall be such delegates, which two delegates in each of the several States shall jointly designate a citizen of such State at large who shall be the third delegate from such State to such convention; that in case of a vacancy in the office of any delegate during such convention, not otherwise filled pursuant to law or by legislative act or as herein provided,

such vacancy shall be filled by the governor of such State from the senate or house of its legislature or the State at large, respectively, as the case may be; that during such vacancy and during the absence of a delegate from the floor of the convention the delegates present from such State shall be empowered to exercise the vote of the absent delegate or delegates from such State; that the legislature of any State may choose its delegates to such convention, other than hereinabove designated, in which case the delegates so chosen shall be certified to the convention by the secretary of state of such State and shall constitute the delegates of such State at such convention in lieu of the delegates otherwise hereinabove designated.

"3. That such convention shall be limited and restricted specifically to the consideration and proposal of this amendment, or such other amendments as may be proposed by the Several States of these United States; the choosing of officers and adoption of rules of procedure for the conduct of such convention and the maintenance of order thereat, the determination of any issue respecting the seating of delegates, adjournment from day to day and to a day certain and from place to place within said city as may be convenient, and adjournment sine die; and such convention shall not be held for any other purpose nor have any other power, and the delegates thereto shall have no power other than within the limitations herein prescribed;

"4. That a permanent record shall be made of the proceedings of such convention, which shall be certified by the secretary of the convention, the original of which shall be placed in the Library of Congress and printed copies of which shall be transmitted to the Senate and the House of Representatives of the Congress, to the Secretary of State of the United States, and to each house of the legislature and to the secretary of state of each of the several States;

"5. That the powers of such convention shall be exercisable by the States, represented at such convention by fully constituted delegates thereat, by majority vote of the States present and voting on such proposal, and not otherwise.

"SEC. 5. The State of Indiana requests that this application shall constitute a continuing application for such convention under article V of the Constitution of the United States until the legislatures of two thirds of the several States shall have made like applications and such convention shall have been called and held in conformity therewith, unless the Congress itself propose such amendment within the time and manner herein provided.

"SEC. 6. The State of Indiana requests that proposal of such amendment by the Congress and its submission for ratification to the legislatures of the several States in the form of the article hereinabove specifically set forth, at any time prior to sixty days after the legislatures of two-thirds of the several States shall have made application for such convention, shall render such convention unnecessary and the same shall not be held; otherwise such convention shall be called and held in conformity with such applications.

"SEC. 7. The State of Indiana requests that as this application under article V of the Constitution of the United States is the exercise of a fundamental power of the sovereign States under the Constitution of the United States a receipt of this application by the Senate and the House of Representatives of the Congress of the United States be officially noted and duly entered upon their respective records, and that the full context of this resolution be published in the official publication of both the Senate and the House of Representatives of the Congress.

"SEC. 8. Certified copies of this resolution shall be transmitted forthwith to the Senate and the House of Representatives of the Congress of the United States, to each Senator and Representative in the Congress from this State, and to the Secretary of State of the United States, and to each house of the legislature and to the secretary of state of each of the several States, attesting the adoption of this resolution by the legislature of this State.

"CRAWFORD F. PARKER,
President of Senate.

"GEORGE S. DIENER,
Speaker of House of Representatives.

"Approved March 12, 1957.

"HAROLD W. HANDLEY,
Governor of the State of Indiana.

"Filed March 12, 1957.

"FRANK A. LENNING,
Secretary of State of Indiana."

[From The Washington Post, Sunday, April 16, 1972]

U.S. POLICY MAY GET HOOVER-TYPE STUDY

(By Spencer Rich, Washington Post Staff Writer)

Alarmed by a proliferation of U.S. civilian personnel overseas in foreign policy roles, Sens. George D. Aiken (R-Vt.) and J. W. Fulbright (D-Ark.) have moved to create a new Hoover Commission to study the functions of the different federal agencies in the making of foreign policy.

Aiken is the senior Republican on the Senate Foreign Relations Committee and Fulbright is the chairman. They quietly pushed through the committee this week an amendment creating a 12-member "Little Hoover Commission" to undertake a two-year study of how foreign policy is made, with emphasis on recommendations for centralizing decision-making and cutting overlap.

The amendment was attached to a bill authorizing State Department and USIA funds.

Aiken said in an interview yesterday that he was particularly struck by recent committee testimony showing that there are 3,400 State Department personnel overseas in regular posts, and 22,000 from such other functions as the Central Intelligence Agency, U.S. Information Agency, Commerce Department, Treasury, Agency for International Development, Agriculture Department, Department of Health, Education and Welfare—and even the Veterans' Administration, which an Aiken aide said has counselors in the Philippines.

Aiken said that half the study commission members would be from Congress and half would be from the executive branch and non-government positions.

Under the amendment approved by the Foreign Relations Committee, the President will appoint two members from the public and two from the executive branch, and the Senate and House each will appoint two of their own members and two persons from private life—a total of 12. Like the original Hoover Commission, the new unit would be given a staff and subpoena powers.

An Aiken aide remarked that there are so many foreign policy agencies that each tends to have its "own" foreign policy and sometimes doesn't work in harness with the others.

Aiken recalled that he had been a member of the original 1947-48 Hoover Commission, headed by former President Herbert Hoover, which did a massive study of federal government organization that resulted in some major structural reforms. "Herbert Hoover expected us to work day and night," Aiken said.

[From the Oakland Tribune, Oakland, Calif., April 24, 1972]

GOLDBERG, CLIFFORD AT POLICY HEARING

Washington (AP)—Former United Nations ambassador and Supreme Court Justice Arthur J. Goldberg and former Defense Secretary Clark M. Clifford urged Congress today to take greater responsibility for developing the nation's foreign policy.

They differed, however, in a bill by Sen. Sam J. Ervin Jr., D-N.C., to give Congress power to veto executive agreements made by the President with other nations.

While Goldberg endorsed the measure and said he had no doubt of its constitutionality, Clifford suggested that it went too far in infringing on the President's powers.

Another witness, Macalester College President James A. Robinson, said it "misses the mark" and would not have prevented "the major mistakes of recent foreign policy."

Robinson said Congress should play a positive, not a negative role, seeking creative and constructive alternatives to foreign policies of the executive branch.

Ervin conducted the hearing on his bill as chairman of the separation of powers subcommittee of the Senate Judiciary Committee. He expressed concern about the increasing use of executive agreements with other nations as a substitute for treaties that are subject to ratification by the Senate.

Ervin's measure is one of a number, like a bill recently passed by the Senate to limit the President's war powers, reflecting efforts to assert a greater Congressional role in foreign affairs.

Goldberg said the Constitution requires the President to submit substantive agreements affecting relations with other countries to the Senate for approval, adding that the proliferation of executive agreements in recent times "cannot justify departure from plain constitutional mandates."

The President's power to enter into binding agreements with foreign powers, he said, is confined to matters of a routine or administrative nature, or expressly authorized by a treaty or by legislation passed by Congress.

Clifford said he is "troubled about the recent trend toward unilateral exercise of presidential powers in the international arena" and sympathized with and supported the intent of Ervin's bill.

But he said the executive agreement authority has a sound basis in constitutional law and testified he did not believe such as those recognizing a foreign government, settling claims, or ending hostilities.

[From The Washington Post, Washington, D.C., April 25, 1972]

U.S. TO HAVE CAMBODIA TIE AFTER VIET PULLOUT, HILL TOLD

(By Laurence Stern, Washington Post Staff Writer)

Administration witnesses have told the House Foreign Affairs Committee that the United States will have a defense commitment to Cambodia even after all U.S. troops are withdrawn from South Vietnam.

This position, spelled out in testimony released yesterday by the committee, suggests a broader scope of U.S. commitment to the survival of the present government in Phnom Penh than the administration previously articulated.

Until now the principal administration justifications for direct American intervention and aid in behalf of the Lon Nol government were first, to safeguard the withdrawal of American troops from South Vietnam and, most recently, to help Cambodia maintain its "neutrality."

The newest enlargement of the rationale for aid to the Phnom Penh government was supplied last March 22 and 23 by Lt. General George M. Seignious II, director of the U.S. Security Assistance Program, and Assistant Secretary of State for East Asian Affairs Marshall Green.

"I think we may have a U.S. interest and policy reasons that would indicate that it was prudent and in our interest to continue some form of support to Cambodia after the U.S. forces have withdrawn from South Vietnam," Seignious said in reply to questioning by Rep. Donald M. Fraser (D-Minn.)

At the same time Seignious asserted that, "we do not have any formal obligation or a commitment to Cambodia that I know of."

Green echoed this position. Assuming all American forces are out of South Vietnam, he said, "I still think we have an interest in the Cambodians being able to have a government of their own choosing, that we could still be opposed to aggression succeeding and taking over Cambodia."

The administration's statements of its goals in Cambodia have been both ambiguous and somewhat ad hoc since the May, 1970, "incursions" by American and South Vietnamese troops.

On May 14, 1970, Secretary of State William I. Rogers said the defense of the Cambodian government is not "our primary purpose and that will not be our purpose in the future."

Since then the administration has begun programs of military and economic assistance to the Phnom Penh government which this year reached a level of \$341 million.

Green revealed in his testimony that the United States is now seeking to help build a Cambodian army force level of 220,000 in fiscal 1973. The current Cambodian force level envisioned in the military aid program is 200,000. Last year the United States was seeking to support a 150,000 Cambodian army. In 1970, when Prince Norodom Sihanouk was deposed by General Lon Nol, the Cambodian army numbered about 30,000.

It was disclosed during the executive session questioning of Seignious that the House Foreign Affairs Committee had prepared a draft report that was severely critical of the performance of the Cambodian military.

The report, compiled by two staff members who visited Cambodia last fall, asserts, that the Cambodian high command is "poorly trained, luxury-loving

and inadequate to the task of effectively fighting the North Vietnamese," according to Rep. Clement J. Zablocki (D-Wis.)

The report also disclosed that the United States was financing the construction of three training centers for Cambodian troops within Cambodia.

Rep. Wayne L. Hays (D-Ohio) informed Seignious that the report found that "a good part of the 200,000 army you are talking about is a phantom army, that they are not there."

Hays also questioned the planned delivery to Cambodia of C-119 transport planes. Speaking of assistance to the Lon Nol government, Hays added: "I don't know how they are going to use this stuff except as this report indicates, to buy Mercedes and television sets and what-have-you."

[From the POST, Washington, D.C., April 25, 1972]

GOLDBERG HITS LACK OF TREATIES

(By Spencer Rich, Washington Post Staff Writer)

Former Secretary of Defense Clark Clifford and former Supreme Court Justice Arthur Goldberg yesterday strongly endorsed a bill giving Congress veto power over international executive agreements concluded by the President.

Sen. Sam J. Ervin Jr. (D-N.C.), chairman of the Senate Subcommittee of the Separation of Powers, opened hearings on the bill with the assertion that presidents are increasingly using executive agreements in place of treaties to conclude major international understandings because such agreements don't require congressional approval. Treaties, on the other hand, require a two-thirds Senate vote to become effective.

Asserting that executive agreements had always been intended only for minor matters, Ervin called their increasing use a signal of presidential desire to "circumvent the treaty-making provisions of the Constitution" and to "usurp legislative power both in the domestic and foreign affairs arenas."

"As recently as 1930," said Ervin, "the U.S. concluded 25 treaties and only nine executive agreements. In contrast, in 1968 the U.S. concluded 16 treaties and 266 executive agreements, and by Jan. 1, 1972, the U.S. had a total of 947 treaties and 4,359 executive agreements."

Goldberg, a former Secretary of Labor and ambassador to the United Nations as well as Supreme Court justice, used language almost as sweeping in endorsing the Ervin bill, which would allow Congress to veto any executive agreement by a negative vote of both chambers within 60 days of its submission to Congress.

Goldberg said the nation is approaching a "constitutional crisis in the relations between the executive and Congress" because of executive assertions of power to act independently which are threatening to disrupt the system of checks and balances. He said these assertions involve not only the treaty powers, but also the war powers.

Goldberg specifically criticized the administration for concluding military base agreements with Portugal and Bahrain as executive agreements instead of treaties.

Clifford was far less sweeping in his comments on misuse of executive agreements, saying he saw no "important legal distinction" between a treaty and an executive agreement, and emphasizing "my own belief in a strong presidency."

Nevertheless, he endorsed the bill with some proposed changes, saying that while "it will be an impediment" to completely free any flexible action by the President in concluding agreements, "It is not in my opinion, an undue impediment" because it will bring Congress and thereby the public back into the decision-making process on foreign affairs.

He said concluding international executive agreements which aren't agreements which aren't subject to congressional review and disapproval carries two practical disadvantages: It leads to excessive secrecy in policy-making, and it can lead to implied military commitments to other nations even though such commitments cannot really be considered valid without congressional sanction.

Clifford proposed changing the wording of the bill to make clear that agreements in areas where the Constitution clearly gives the President power to act

alone (recognition of a foreign government, settlement of claims, cessation of hostilities were examples he cited) shouldn't be subject to the congressional veto.

Dr. Elbert M. Byrd Jr., author and educator, called the bill a quest for "automatic" solutions to problems, and said the congressional power of the purse would be a more effective way to restrain the executive if necessary. Dr. James A. Robinson, president of MacAlester college in Minnesota, supported the general objectives of the bill but said he feared it wouldn't do what is generally intended in it: Only a real revival of congressional activism in foreign affairs could.

Foreign Relations Committee Chairman J. W. Fulbright (D-Ark.) supported the thrust of the bill, saying Presidents were submitting minor matters as treaties—like enlarging the size of one international agency from 24 to 35 members—while making major international commitments through executive agreements.

[From the New York Times, Tuesday, April 25, 1972]

CONGRESS URGED TO CURB USE OF EXECUTIVE ACCORDS

(Special to The New York Times)

Washington, April 24—Two Johnson Administration officials and the chairman of the Senate Foreign Relations Committee called on Congress today to assert control on executive agreements with foreign countries.

Testifying at a hearing conducted by a Senate Judiciary subcommittee, former Secretary of Defense Clark M. Clifford said that there had been an excessive use of executive agreements, which do not require Senate approval. This, he said, has resulted in "undue secrecy" and too many "assurances of support" to foreign countries.

Arthur J. Goldberg, who was United States delegate at the United Nations and previously had served as a Supreme Court justice, said that Congress had a clear responsibility to take back the "powers which it has abandoned too long."

FULBRIGHT ASKS ACTION

Senator J. W. Fulbright, Democrat of Arkansas, the chairman of the Foreign Relations Committee, called for strong action to stop "the erosion and evasion of legislative power" in foreign policy.

The testimony was on a bill that would give Congress power to veto executive agreements. The subcommittee, headed by Senator Sam J. Ervin Jr., Democrat of North Carolina, the sponsor, began three days of hearing on the proposal.

Mr. Ervin said that as of Jan. 1 the United States had entered into 4,359 executive agreements which do not require Senate approval, and 947 treaties, which call for concurrence by two-thirds of the Senate.

"During the past few decades," Senator Ervin said, "the executive branch has found irresistible the temptation to dispose of what it considered routine matters through the short-cut method of entering into executive agreements rather than the constitutional method of making formal treaties."

Senator Fulbright urged stronger legislation than Ervin bill, saying that either house should be able to override an executive agreement.

Also testifying at the hearing were Dr. James Robinson, president of Macalester College, and Dr. Elbert M. Byrd Jr., former professor of government at the University of Maryland. The two men, who have written books on foreign policy agreements, urged other methods—such as control on appropriations—instead of the Ervin proposal to assert the role of Congress in foreign policy.

On Feb. 16, the Senate approved, by a vote of 81 to 0, and sent to the House a measure that would require all international agreements to be submitted to Congress for its information. Mr. Ervin's proposal would go far beyond that bill, now awaiting House action, by providing that Congress could override any executive agreement within 60 days after its transmittal.

[From the New York Times, May 1, 1972]

THE TREATY POWERS

The tendency of Presidents to circumvent the Constitutional requirement for Senate approval of treaties by concluding executive agreements has reached extraordinary proportions in recent years. In the 150 years prior to 1939, the United States entered in 799 treaties and 1,182 executive agreements, one-and-one-half times as many. In the last 26 years, according to State Department compilations, 368 treaties have been concluded but fifteen times that many executive agreements have been signed—a total of 5,590. In addition, there are over 400 secret agreements, the nature of which the State Department declines to reveal. Moreover, thousands of other executive agreements evidently have been concluded by other governmental agencies, particularly the Defense Department, which reportedly refuses to disclose the details even to Congressional committees.

The Senate demonstrated its dislike for this state of affairs in February when it voted 81-to-0 for the Case Bill, which would require all international agreements to be sent to the Congress for its information. Senator Ervin of North Carolina has now gone much further with a bill that would empower the Congress to veto any executive agreement within sixty days of its transmittal, if a majority of both houses voted against it.

The Senate's concern is primarily with executive agreements, negotiated without consulting Congress, on such matters as the stationing of American troops abroad and the establishment of military bases. Such steps can commit the nation to war in some circumstances as thoroughly as a treaty of alliance. The same concern has already led the Senate, by overwhelming majority, to approve the Javits-Spong War Powers Bill, which would forbid the use of American armed forces in combat for longer than thirty days unless the President had obtained the consent of Congress.

A further objective that would be achieved by the Ervin bill, in the opinion of former Defense Secretary Clark Clifford, is that it would discourage "undue secrecy" and too many "assurances of support" to foreign countries. Where there is a valid reason for secrecy, the Ervin bill would permit closed Congressional hearings and action by both houses in executive session.

Some executive agreements, of course, merely implement treaties approved by the Senate. The Congress could be swamped and the conduct of foreign policy hamstrung if every minor contract on economic aid or construction of military facilities abroad required extended hearings and Congressional debate. The late Secretary of State Dulles told a Senate Judiciary subcommittee on April 6, 1953, that 10,000 agreements had been concluded to implement the NATO treaty.

The Ervin bill would not require every executive agreement to be debated. It would simply enable the Congress to debate those it felt deserved such scrutiny. Most important, it would force the executive branch to revive the kind of close consultation with key Congressional committees—in advance of signing important international engagements—that has existed in the past.

Such consultation would not guarantee the nation against another Vietnam. The Congress is no more immune to error than the Executive. But it would restore a safeguard that too long has been absent.

[From Time (Magazine), May 15, 1972]

ARMS CONTROL—AGREEMENT ON ENOUGH

The White House last week announced a "major advance" in the Strategic Arms Limitation Talks, which have been going on since 1969. The advance—a compromise worked out in a secret exchange of letters between President Nixon and Soviet Party Chief Leonid Brezhnev—represents an important milestone in U.S.-Soviet relations and reflects a long-term change in Washington's policy. Where once the U.S. sought to maintain overall nuclear superiority, Washington has now settled for what Nixon has called "sufficiency"—that is, enough arms to deter any Russian attack by promising a devastating retaliatory strike.

Though many difficult details must still be worked out by SALT negotiators, now meeting in Helsinki, the overall shape of the nuclear accommodation between the superpowers was beginning to emerge. The U.S. and the Soviet Union agreed to a series of ceilings and freezes in which Washington has consented to Soviet parity—and in several cases numerical superiority—in every major category of defensive and offensive strategic nuclear weaponry (see *chart*). In return, the Soviets made two important concessions. They agreed to place limits on the number of missile subs. But more important, they agreed to exclude from the present freeze U.S. tactical nuclear weapons in Europe and aboard the Sixth Fleet in the Mediterranean. Hence the U.S. was able to avoid unnerving its European NATO allies, who would look askance at any unilateral dealing with the Soviets over American weaponry that is committed to the defense of Western Europe.

The compromise virtually ensures that Nixon and Brezhnev will be able to have a historic signing ceremony if and when the President visits Moscow later this month. They will probably have two documents to sign. One is a full-fledged treaty, already agreed upon, limiting the number of defensive ABMs, or anti-ballistic missiles, that each side may install. The second, barring any last-minute snag, will be an executive agreement setting informal ceilings on offensive strategic missiles until the SALT negotiators can come up with a formal pact. The major points of the two documents:

ABMS. The U.S. and the Soviet Union will each be permitted to maintain only two ABM complexes of 100 missiles each. The Soviets, who have chosen to defend populated areas, will probably add new missiles to the 64 ABMs that now ring Moscow. They may also convert the Tallin Line of antiaircraft missiles near Leningrad to ABMs. The U.S., which by contrast has chosen to use the allotted ABMs to protect its land-based missile force, originally had announced its intention to build 14 Safeguard ABM complexes. Now it will complete only the two sites at Grand Forks, N. Dak., and the Malmstrom, Mont.

ICBMS. Pending a formal treaty, both superpowers will freeze the number of ICBMs at the present level, which leaves the U.S. at a 2-to-3 disadvantage (1,054 *v.* 1,550). Both sides will be free to replace older missiles with newer ones. More important, no ceiling has been placed on nuclear megatonnage, a category in which the Soviets already have far outdistanced the U.S. and which helps them overcome their disadvantage of having less accurate missiles. In fact, some Pentagon experts expect the Russians to install new monster ICBMs in the big empty silos that have recently been detected by U.S. surveillance satellites. The U.S. has more warheads on its missiles—5,700 to the Soviets' 2,500 though Moscow will be allowed to draw even on that score. At present, the U.S. has a considerable technological lead. Its MRV (multiple independently targeted re-entry vehicle) warheads can be steered to widely separated targets. By comparison, the Russian MRVs (multiple re-entry vehicles) simply fall in a prearranged cluster.

MISSILE SUBS. Under the ceiling, the Soviets who have lagged far behind the U.S. in the development of undersea nuclear missiles will be permitted to complete the 17 submarines now abuilding; within the next couple of years Moscow's missile-packing submarine force will outnumber by one the 41-ship U.S. undersea missile fleet.

Even though the compromise on offensive weapons allows for technological improvement—the U.S., for instance, may eventually replace its missile submarines with the undersea long-range missile system (ULMS), at \$165 million per sub without armament—it nevertheless promises to bring the nuclear numbers race to a halt. It also, it is hoped, will serve as a guideline for a full-fledged treaty that will regulate offensive missiles in the same manner in which the ABMs have been brought under control. When and if that happens, the strategic arms pact will rank historically with the nuclear test-ban treaty (1963) and the nuclear nonproliferation treaty (1968).

[From the St. Louis Post-Dispatch, May 25, 1972]

MOSCOW AGREEMENTS

By every visible sign, President Nixon's hope that his summit meeting with Soviet leaders will be memorable for its substance as well as its spirit is hap-

pily being fulfilled. A number of technical agreements have been reached, including an important arrangement to co-operate in space exploration; but the truly momentous event reported from the Kremlin is that the two nations have agreed to place limitations on both defensive and offensive nuclear weapons.

There is yet no indication of what is transpiring in Mr. Nixon's private talks with Communist Party Secretary Brezhnev, no suggestion that progress is being made in such areas as trade, the Middle East, Indochina or European security. Yet even if Mr. Nixon leaves Moscow without a commitment from the Russians in any of these matters an agreement on strategic arms alone would make his trip a success.

The details of the technical and scientific agreements were worked out before Mr. Nixon left Washington, which suggests that the two countries not only are serious about enlarging their areas of co-operation but that both were concerned that the agreements would be ready to be announced dramatically at the summit. In the relationship between the U.S. and the USSR, it is almost as important to be perceived by the world as being in agreement as it is actually to be in co-operation.

Except for the agreement to conduct a joint manned space mission in 1975, the other accords are as much significant for their symbolic value as for what they may accomplish. Cooperation in solving medical and environmental problems and the exchange of personnel and information in space research should stand as predecessors for other joint efforts at solving problems faced by both nations. And it should go without saying that the more both countries pursue common objectives together, the more they ought to trust each other and the less likely they should be to resort to rash belligerency.

The reported terms of the strategic arms agreement are themselves little surprise. It was known that the two nations were close to a treaty that would cover not only antiballistic missile systems but also land and submarine-based intercontinental missiles. If the treaty is signed as expected tomorrow, it will stand as a crowning tribute to the long and patient work of the negotiators at the Strategic Arms Limitation Talks—and also to the sensible realization by both countries that a continued weapons race was not only financially absurd but also potentially suicidal.

One puzzle in the agreement is that the ABM section will be the object of a formal treaty while the offensive weapons will be covered by an executive agreement between Mr. Nixon and Soviet President Podgorny. It would have been preferable to include both parts in a single treaty, but an executive agreement in this instance does not alter a Senate-ratified policy of arms control that previously has been expressed in the treaties for a limited test ban, nuclear nonproliferation, prohibition of nuclear weapons in space and the non-military use of the Antarctic.

Even this treaty, however, provides only a starting point for an effective international system of controlling nuclear weapons; and it will fail in its objective if the race for a quantitative edge in strategic arms is replaced by a race for a qualitative advantage. Nonetheless, it is an essential first step toward any possible elimination of the nuclear menace. As such, the beneficiaries of this treaty will not only be the citizens and economies of the U.S. and Russia. They will be all the people of the world.

[From the Christian Science Monitor, Thursday, May 25, 1972]

SPRING THAW IN MOSCOW

The cool formality and diplomatic correctness that marked President Nixon's reception in Moscow on Monday appears to have given way to a warmer atmosphere. Doubtless the sunwashed Russian spring weather helped. But the most effective thawing agent was the apparent desire on the part of both Americans and Russians to signal the world that they were serious about co-operative efforts to reduce world tensions.

That intent explains the early and elaborately ceremonial signing of two pacts. The one promises future cooperation by both promises future cooperation by both countries in research on environmental problems. The second formally acknowledges an earlier accord on mutual cooperation in medical research, including environmental health problems. To note that both agreements

were carefully worked out before the actual summit meeting so that they could be used as evidence of rapprochement does not detract from their usefulness. Especially valuable is the environmental research agreement, both for itself and for any weight it may have in helping convince the Kremlin to send delegates to the Stockholm international conference on environmental problems this summer.

Further evidence of Russian-American rapprochement is expected, perhaps this weekend, as the two superpowers move to final agreement on strategic arms limitation. Except for some not unsolvable details, mainly the question of locating offensive and defensive land missile bases, the two countries appear ready to limit defensive missile to 200 launchers for each side. A separate understanding would freeze the number of offensive missile systems, both land- and submarine-based, to present levels.

But even as these carefully preorchestrated public demonstrations of accord are flashed out to the world by radio and television, Mr. Nixon and Soviet Communist Party chief Leonid Brezhnev are holding long secret sessions on how to achieve detente in other areas of global interest. Moscow would like to get U.S. approval of its long-sought European security conference. Mr. Nixon would like Soviet help in bringing North Vietnam around to letting the United States get out of Vietnam "with honor" and with its prisoner of war, and in defusing the Middle East.

The Vietnam situation, as of this writing, has come up only in a deliberately casual suggestion by Mr. Brezhnev that the United States return to the Paris peace talks with Hanoi. But beyond this the Kremlin has shown little desire to influence Hanoi to bow to Washington. Whatever points Mr. Nixon may have won toward persuading Moscow to intervene with Hanoi by his earlier Peking trip have been at least watered down by the bombing offensive and arms blockade against Hanoi. These acts have in fact driven Moscow toward Peking in the matter of shipping Soviet arms to Hanoi via China.

Thus the single most distressing issue on the international scene, the Vietnam war, remains the one least susceptible to resolution at the Moscow summit. Despite that, the businesslike and apparently determined effort by both sides to maximize the possible areas of agreement make the summit one of the most hopeful events of our recent deeply troubled times.

[From the Chicago Daily News, May 25, 1972]

THE BUSINESSLIKE SUMMIT

The agreements flowing from the Moscow summit continue to explain why it was not called off in spite of the escalated fighting in Vietnam. A great deal of spadework has obviously gone into this meeting of President Nixon and the Soviet leadership, not all of it apparent beforehand. On the record thus far, this appears to be summitry at its best, avoiding the pitfalls of earlier top-level conferences where impulse and expediency led to later misunderstanding.

As one Russian remarked to *The Daily News'* Peter Lisagor in Moscow, several agreements were "precooked," and their scope is impressive. The least controversial came first, as might be expected. Nobody can be in favor of disease and pollution, and the self-interest of the superpowers coincides in the fight against them. Even so, the agreement to exchange information and co-operate on health and the environment marks a considerable advance and raise hope that formidable problems can be more quickly solved by joint effort.

The agreement toward joint exploration of space is another gain. Work was already going forward on redesigning spacecraft so that U.S. and Russian ships might link up in orbit. The Moscow seal hastens the day when American and Russian spacemen will work side by side in orbit and perhaps on the moon.

The big one—arms limitation—is still to come, but here too the long period of highly technical preparation seems about to pay off. And if the superpowers can make this work, a considerable degree of relaxation will be possible in international affairs.

There is still an unreal quality about this meeting in the Kremlin and the agreements coming forth like a string of sausages. No one dares to forget that while the American flag flies alongside the hammer and sickle over the Krem-

lin walls, missiles are poised and ready that could obliterate most of the people of Russia and the United States. The image springs to mind of a Wild West poker game with guns at the ready, except that the stakes in this game are higher than mankind has ever known.

But for almost the first time, an element of trust seems to be present in the Soviet-American face-off. It's only a delicate seed so far, and a misstep could crush it. But the idea has at least been planted on both sides that on some things they have to trust each other or the world will surely blow apart. If that seed can be nurtured through co-operation in health, environment, trade and space exploration, perhaps its growth can smother the ruinous proliferation of weapons of death.

[From The Evening Star, Washington, D.C., April 10, 1972]

MOON TREATY WORK BEGINS

Geneva (UPI)—Legal experts began work today on a new space treaty which would ban use of the moon for military purposes.

Such a treaty was proposed by the Soviet Union at the last meeting of the United Nations General Assembly.

The 28-nation legal subcommittee of the Committee on the Peaceful Uses of Outer Space, is drawing up the terms of the accord.

Most delegates were confident that agreement will be reached although they said the drafting of legal articles and later approval by the major committee and the General Assembly probably will take two to three years.

The object is to reserve the moon for peaceful uses and to prevent any attempts to turn it into a launching station for nuclear weapons.

Earlier agreements cover principle for the peaceful exploration of outer space, which came into force in 1967, and automatic return and rescue of astronauts and objects launched into space, which went into effect in 1968.

[From the Baltimore Sun, May 28, 1972]

THE MOSCOW AGREEMENTS, LIMITED

Some world events are obviously historic at the moment of their occurrence. With others, as with the Russo-American strategic arms limitation treaty, it is necessary to wait and see. If this should lead step by logical step to an actual slowing and then a cessation of the reckless nuclear-arms competition that threatens the planet, it will indeed have been historically memorable. Such are the expressed intentions of the signatories, and they seem at the moment to be good intentions, as the holding down of numerical levels of missiles should surely indicate.

Nevertheless, the treaty and its accompanying executive agreement are carefully circumscribed. Under the formal treaty, which requires Senate ratification, each country would be limited to the setting up of two defensive anti-ballistic missile systems, one for the protection of each capital city and one for the guarding of strategic sites of offensive missiles. The weapons at each site would be held to no more than 100. What it appears to come to, in simple terms, is that the capacity for "overkill," offensive and defensive, remains but is reduced somewhat—a statement that might make little sense in any world but ours.

The agreements further leave both nations virtually free to increase the mass of their nuclear arsenals and to proceed with a continued "sophistication" of the weapons: a freedom which Defense Secretary Laird has already said the United States will explore to the fullest, as without question will also the Russians.

The nuclear-arms race, that is, can hardly be said even to be beginning to be over. Within the terms of these agreements the signatories can, if they choose, continue it and for that matter, in terms of destructive force and effectiveness, step it up.

The Moscow document should be taken, rather, as an acknowledgment of the cost and the perils of the course up until now, and of intent to try to increase the presently residual ingredient of rationality in world affairs. In that they deserve our welcome, even as history withholds any instantaneous applause.

[From the Washington Daily News, May 25, 1972]

Moscow : So Far, So Good

It's too soon, of course, to throw one's hat in the air and cheer President Nixon's summitry as a resounding success. But he seems to be making good progress.

He appears to be getting on well with Communist party boss Leonid I. Brezhnev, which was not sure in advance, and is signing a series of useful agreements in Moscow.

The agreements already reached call for cooperation in fighting air and water pollution; co-ordinated research in the fields of cancer, heart disease and environmental health; scientific and technical exchanges, and the joint exploration of space, including a manned flight by Russian and American astronaut in 1975.

Admittedly, none of these agreements alone is earth-shaking. But, taken together, they point to a pattern of cooperation that, if it develops, would mean better Soviet-American relations.

We're intrigued by the plans for the docking of a Soviet and an American spacecraft and an exchange of crews.

This is a step toward taking the element of competition out of space flights which has increased these costs to both countries. And it presupposes a lack of serious tension between Moscow and Washington thru 1975.

Neither government would think of a joint space flight if it anticipated a screaming, rocket-rattling confrontation in the future.

Naturally, not expecting such a confrontation is no guarantee that one won't develop. But if the superpowers act as if they do not expect a showdown, a dangerous crunch is far less likely.

Still to come at the summit are agreements on limiting strategic arms, increasing Russo-American trade and taking the first step toward a mutual troop withdrawal in Central Europe.

These are genuinely important measures and, if they come thru without hitches, they'll confirm and strengthen the signs of easier relations that already have emerged from the Nixon visit.

We don't know, of course, what Mr. Nixon and Mr. Brezhnev are saying in private about those potential flashpoints of East-West war, Vietnam and the Middle East. Based on the favorable atmosphere in Moscow, it's possible to hope they will agree that those danger areas must not be permitted to lead to a Soviet-American conflict.

Such an understanding, if it's reached, would hardly be made public. Yet it would be the most significant of Mr. Nixon's accomplishment in Moscow. We hope and assume he is working hard to get it.

[From the Christian Science Monitor, Friday, May 26, 1972]

COMMITMENT TO PEACE . . .

Summer, 1975: three years from now, American and Soviet spaceships will link up in orbit around the earth.

That is a commitment to peace, to friendly relations in the years ahead on the part of the world's two superpowers.

The art of summitry is to produce results. Without concrete results, a summit meeting falls as flat as a pancake. But to achieve results the most careful preparatory work is essential.

The Nixon-Brezhnev meeting has knocked off agreements thick and fast. Months of patient work must have gone into their drafting. As the summit got into high gear in Moscow this week, we began to see why both sides wanted it so badly, and why neither side would let itself be diverted by the Vietnam war.

Of the spate of technical and scientific agreements signed at the Kremlin Tuesday and Wednesday, the planned rendezvous in space between an American Apollo spacecraft and a Soviet Soyuz is the most spectacular.

It means that the Apollo program, which was to have been wound down with a final moon landing at the end of this year, will now be extended. The

United States has three earth-orbital Skylab missions scheduled for next year. After that there would have been a gap in manned space flights until the space shuttle is ready in 1978. The Apollo flight with the Soviet Union in 1975 will help bridge that gap. It will mean that key elements of the Apollo teams can be kept intact. It will mean an estimated 4,400 more jobs in the aerospace industry. It will mean that Soviet space crews will come to the United States for training and vice versa. And once the rendezvous is made televiewers in both countries will be able to watch their astronauts moving from one spacecraft to another and conducting joint scientific experiments.

True, implementation of the agreement will depend on the U.S. Congress voting new funds to keep the Apollo program going. But this surely Congress cannot fail to do in view of the significance that the joint space program has for the future.

We have always felt that the immense adventure of space exploration should not be subjected to national exclusivities or rivalries. The United States and the Soviet Union have a vast lead over other countries in the space field, but we look forward to the day when joint exploration of the universe will be a multi-national, indeed, a world enterprise. The American-Soviet agreement opens the door to that possibility.

... AND AN ISSUE THAT UNITES

The pact on the environment signed by Presidents Nixon of the United States and Podgorny of the Soviet Union recognizes that the superpowers' ultimate development hinges as much on making peace with their own habitat as on adjusting the military strength they control.

In this, as in the space pact, both the U.S. and the U.S.S.R. wanted something concrete to show as an earnest of good summit intentions. Yet it would be wrong to characterize the environmental agreement as in any sense mere window dressing. It is historic in its own right, regardless of the outcome on the more immediately nettling SALT and Vietnamese issues.

The pact is the first comprehensive agreement between major industrial powers on the environment. The U.S. has an agreement with Canada on the Great Lakes, an air pollution project going with Mexico, and so on. But these are limited in scope, not attempts to share knowledge, manpower, technology, and research on a systematic basis across the full range of environmental concerns: air and water pollution, urban sprawl, the preservation of countryside.

True, the pact risks nothing on either side. Specific joint projects have yet to be agreed on. Such security issues as inspections or monitoring of rates of pollution within the other's borders are avoided. Results lie in the future.

Yet both nations can expect to gain and to learn from the other. The U.S. is ahead in many technologies, such as waterborne waste treatment, while the Russians have more experience with pipeline efforts in its vast Arctic territory.

The Soviet Union is deeply interested in how the U.S. administers its environmental efforts. The U.S.S.R. does not have a central unit comparable to the Environmental Protection Agency or the Council on Environmental Quality in the U.S. In such categories as industrial pollution, it leaves enforcement up to the various industries which have their own central planning board. In turn the ministries set standards for individual plant, making the plant manager personally responsible for meeting emissions or waste standards. The weaknesses in this system can be readily seen. When half a dozen industries are simultaneously dumping wastes into the Volga River the issue of responsibility gets blurred.

The Soviet Union has environmental problems uniquely of its own making. It may be something of a joke to Westerners that Soviet planners seem to do everything on a massive scale—massive factory programs, stupendous water diversion projects. But this habit of large scale now has many in that country deeply concerned. For example, they are asking how the diversion of Arctic waters to arid southern regions will affect their climate and weather. Their cities are just beginning to feel the impact of the automobile. There are now only 200,000 cars in Moscow for its seven million people. In five years there will be a million cars. What will happen to the city then?

These are kinds of problems the two superpowers share. The environmental pact signed this week sets the environment apart as a cooperative, not competi-

itive issue. It recognizes that industrial might and the multiplying of urban culture, if undisciplined, would devastate the two powers' habitats as surely as undisciplined nuclear weaponry.

[From the Boston Globe, May 27, 1972]

THE BEGINNING OF SANITY

After a quarter of a century of accelerating and fully justified anxiety, the nuclear treaty negotiated by President Nixon and Soviet leaders at the Moscow summit gives the world a chance to breathe a little easier.

The treaty may be attacked from two sides, both in the Senate when it comes up for ratification and on the hustings this fall, one side denigrating it for what it does not do and the other saying that any slightest concession to the Communists is too much.

Realists, however, will applaud it as a step in the right direction at the very least, a platform on which larger agreements can be erected in the future after both nations have learned how comfortably they can live with this one. An agreement of any kind has to be put down as a triumph for all men everywhere, for it has been clear to many from the beginning not only that a rapidly arming United States and a rapidly arming Russia were threatened with bankruptcy, but, infinitely worse, that their destruct of each other and their mad race for larger and larger stockpiles of nuclear weapons almost inevitably would put them on a collision course. Expenditures, of course, do not nearly measure the potential for disaster that was abuilding. It is noteworthy, however, that the US has spent \$25 billion on strategic weapons systems in just the last three years. And though it will of course be argued that it was this which guaranteed us some semblance of security in that time, speculation also is in order on what such a sum might have contributed to the solution of pressing domestic problems.

The agreement on anti-ballistic missile launchers (ABM in the US, the Galosh system in Russia) is a standoff, with both nations limited to 300, two sites in the US and two in Russia. This will be accepted as fair and workable.

There may be some criticism of the agreement freezing land and sea-based offensive missiles at their present levels. One criticism would be that the accord is another Executive Agreement not requiring Senate confirmation, as does the treaty. There may be some validity to the criticism on this ground, for the Senate understandably argues that its advice and consent should not be disallowed, and there is some question as to the constitutional legitimacy of substituting such agreements for treaties.

The criticism that the Russians have the better of the bargain in some categories, however, omits that the US, for whatever it means in any event, has the better of it in other categories. In land-based offensive missiles, the Russians have the edge, 1500 to 1054. But in submarine-based, the US has the edge, 656 to 500. Who is to say where superiority lies?

A possible defect in the Executive Agreement lies in the accord allowing the replacement of missiles when newer types are developed. As Sen. Edward M. Kennedy has argued in support of his proposal for a Comprehensive Test Ban Treaty (CBT), more testing is almost certain to result in developments which could upset the basic parity on which Washington and Moscow now at long last have agreed:

"It surely makes little difference whether we or they discover technological innovation first. Once known, the information inevitably will spread to the other side. And so even our own success might well threaten our security by offering the Soviet Union a new model to copy."

This does indeed seem to be so. The record of what has been accomplished so far, however, suggests hope, and certainly not despair. Little by little, the superpowers over the years, berating each other at almost every step, have moved closer and closer to the realization that they will have to live with each other or not at all.

In 1963, there was the Partial Test Ban Treaty. In 1968, the Non-Proliferation Treaty. Neither of these demanded the on-site inspection which so far has blocked even consideration of CBT. But this objection is nullified now by the super-sophisticated off-site inspection techniques that have been developed.

A Comprehensive Test Ban Treaty should by all means be put at the top of whatever new agenda Washington and Moscow have in the cards. The groundwork of at least some seeming mutual trust now has been laid for it, and it would be a tragedy not to push ahead.

[From The Washington Post, Washington, D.C., May 28, 1972]

THE PROMISE IN MOSCOW

There is little that is either spectacular or new in the three agreements on space, scientific cooperation and pollution signed this week in Moscow but there is a great deal in each of them that is worth applauding. Underlying all three agreements is an acknowledgment by the governments of the United States and the Soviet Union that the problems in these areas run beyond national boundaries and that the solutions to them are more likely to be achieved through joint efforts than through nationalistic enterprise. Thus, the long-range impact of these agreements can be far more substantial than the showmanship surrounding their signing may suggest. They are not the product of brief negotiations but the result of prolonged and sustained effort. If the agreements can be implemented in the years ahead in the same spirit that has prevailed in Moscow this week, they can improve not only the relations between the two governments but also the conditions under which life is lived on this planet.

The space agreement, for example, consist largely in one concrete project—a docking in earth orbit of an American and a Soviet space ship—and a promise. The promise is that this first docking and the steps that lead to it may be the key to a coordinated joint effort to explore and exploit those parts of the universe within man's reach. If it is possible for the two countries to work closely enough and to share enough information so that the docking exercise goes smoothly, it ought to be possible for them to cooperate on most other aspects of space operations. The benefits to each country from such an arrangement would be great. By curtailing both competition and duplication in space activities, scientists on both sides would be able to do in good time the things that ought to be done without straining the financial resources of their governments nearly as much in the process.

The agreement on scientific cooperation contains similar promise. Everybody agrees that the most rapid scientific advances are made when the largest number of scientists are free to exchange knowledge and technology with their counterparts wherever they may be. Indeed, there has been an increasing amount of sharing between Russians and Americans in some scientific fields in recent years, perhaps most notably in the efforts to convert to peaceful uses the energy of hydrogen fusion. The problems in this area and others are so enormous and the need for successful development so great that the interests of each country, as in space, are better furthered by cooperation than competition.

The pollution agreement stands on a somewhat different footing, and its announcement this week was more of a surprise than either of the other two. This is true, we suppose, because many of those interested in antipollution programs have been focusing so much attention on next month's international conference in Stockholm that the possibility of American-Soviet bilateral negotiations was overlooked. Indeed, this new agreement could simplify the tasks at Stockholm by helping to cut through or circumvent some of the political entanglements that are threatening the success of that meeting. Pollution is clearly a world-wide problem that cannot be solved by any one nation or any two, even if the two are the United States and the Soviet Union. But if we and the Soviets fulfill this new promise to work together on the problem the chances of getting others to join should be increased. And, as in space and science, the sharing of information and technology as well as the development of joint programs can reduce the cost and speed the pace of protecting the world's environment.

None of these things, of course, is mandated by these agreements. Each is, as it stands, a short-term arrangement which—in the main—calls for more talk and more consultation. But it seems to us that the more consultation and cooperation there is now, the more there is likely to be in the future, and

therein lies the promise and the real meaning of these accords. They are a milepost on the road toward solving some of the world's pressing but admittedly "nonpolitical" problems. Still, along the way to finding joint solutions to them, it is possible that we will also develop the joint trust necessary to solve many of our larger political problems as well.

[From the New York Times, May 28, 1972]

THE MOSCOW SUMMIT

Both the American and the Soviet people have good reason to be happy about the developments at the Moscow summit. The gains made go beyond the specific agreements that were concluded, notably the historic Nixon-Brezhnev accords on limiting defensive and offensive missiles. More important for the long run may well be the personal contacts between the leaders of the two nations and the positive images of the two nations transmitted by both Soviet and American media to their audiences. President Nixon underscored this aspect when he told the Soviet leaders at Friday's banquet: "We look forward to the time when we shall be able to welcome you in our country and in some way respond in an effective manner to the way in which you have received us so generously in your country."

Nevertheless, the millennium has not arrived in Soviet-American relations. The deep division between the two countries over Vietnam and the Middle East remain unresolved. The Soviet leaders have not surrendered their ideological ambitions. And even as cordiality reigned in Moscow, American planes were pounding North Vietnam, while frantic Soviet efforts were under way to ship still more military supplies to Hanoi despite the mining of North Vietnam's harbors. These unresolved tensions were reflected at the summit in the failure to reach concrete agreement on trade and credits, a setback that was partially mitigated by the decision to set up a joint commission to negotiate a comprehensive trade agreement.

The summit and its accomplishments would have been impossible if, on both sides, there had not been a cooling of earlier ideological passions and a new primacy of national self-interest. A key to making this development possible was undoubtedly the new relationship forged last February in Peking between the United States and the Chinese People's Republic. Mr. Nixon discovered there that it was possible to do mutually beneficial business with even such Communist zealots as Mao Tse-tung and Chou En-lai, a realization that implied still greater possibilities in negotiations with the more moderate Communists in Moscow.

For the Soviet leaders, the emergence of the new—and still ambiguous—Peking-Washington relationship made it a matter of primary importance to improve Moscow-Washington relations. A Soviet refusal to receive Mr. Nixon would have raised the danger of driving the United States and the Chinese Peoples Republic closer together, perhaps leading to the dread possibility of a Chinese-American alliance against the Soviet Union. It was to prevent such a development that the Soviet doves—against the vigorous opposition of their hawkish colleagues—decided not to make an immediate issue of Mr. Nixon's Vietnam escalation and to go ahead with the summit as planned.

For a stable world in which peace is more secure than it is now, all three great powers must have good relations while the temperature in areas of greatest tension—Indochina and the Middle East—is lowered by accords acceptable to all sides. That desirable situation is still elusive, despite the progress made in Peking last February and now in Moscow. It is encouraging, however, that some of the venom has left Soviet-Chinese relations in recent weeks, while Peking has taken the Nixon-Brezhnev talks more calmly than it took the Eisenhower-Khrushchev meetings in 1959.

President Nixon, aided by both Mao Tse-tung and Leonid I. Brezhnev, has improved the atmosphere of international relations. The task ahead is twofold: to continue the progress achieved among the great powers and to utilize the greater warmth that has entered their relations as a lever to bring just and lasting peace to Vietnam and the Middle East.

[From the Washington Star, Monday, May 29, 1972]

MESSAGE FROM MOSCOW

More than anything else, the world needs a little hope. In recent years, a great many people have come to fear that the forces of destruction may well be inexorable. But those who have felt such despair must have felt something quite different yesterday, as they heard President Nixon speaking from Moscow. For he was trying, as mightily as any leader ever has, to tell a new vision of peace to the world. And to back him up, he had one of the most momentous diplomatic achievements of modern times.

It was a fine, warm speech—quite possibly, when all is said and done, the most important one he ever will make. That will be the case if indeed it marks the beginning of an era of concord, and even cooperation, between the world's two greatest powers. If a firm mutual understanding really should materialize out of the Moscow meetings to study war no more, as the old song puts it, then Richard M. Nixon is assured of a high historic pedestal.

The upshot of that will not be apparent for some time—until we've seen how the nuclear arms limitation treaty works out, and how the general climate of cordiality bears up under future stresses and strains. All this was implicitly recognized in Mr. Nixon's remarks. He is not naive. The United States and the Soviet Union, he said, "have taken a historic first step" toward ending the arms race. In the past week they've made some good strides on "the long journey," but there is recognition that stumbles are possible: "It is important to both of our peoples that we continue those strides."

Assuredly Mr. Nixon went the full mile, and further, in reaching agreement with the Russians on nuclear arms limitations. Here at home, he will face some criticism for allowing the Soviets numerical superiority in weapons. It is an experiment in hope that will give a good many people the shivers, and not altogether without reason. But it is defensible in light of the awesome destructive capacities that will be unaffected by it, and because the alternative is a run-away nuclear weapons race that would be much more chilling and maybe bankrupting in the bargain. It clearly was time for a bold initiative for nuclear deceleration, which the President now has taken, and not without incurring some risks. The country must go along with him, and hope that the Soviets' zeal for strict controls prove equal to his.

In any event, he gave the world a most appealing picture of what it could become: "Let our goal now be a world free of fear—a world in which nation will no longer prey upon nation, in which human energies will be turned away from production for war and toward production for peace, away from conquest and toward invention, development, creation. . . ." The agreements reached in Moscow for cooperation in the fields of medicine, science, pollution control, trade and space flight are, he hopes, the beginnings of constructive cooperation. And while some of these still are more symbolic than substantial, they nonetheless are heartening symbols.

We're glad that the first potential stumbling block—Vietnam—was dealt with firmly, though not by name, in the address. The reminder that large nations can be sucked into war by conflicts between smaller nations, and the admonition that this be prevented—clearly aimed at his Soviet hosts—was well stated. This may, however, indicate failure in the talks to reach any understanding on Vietnam. We can only hope that events will reveal what words have not, in a salutary way.

The marvel, of course, was that Mr. Nixon was speaking at all there in the Kremlin, pushing his ideas and promoting America to possibly 100 million Russian TV viewers. Not many years ago it would have been unthinkable—even a month ago it seemed unlikely because of Vietnam war developments. We've seen that wonders still are possible; now we must hope that this one endures and improves.

[From The Evening Star, Washington, D.C., May 30, 1972]

RUSSIA GETS N-SUPERIORITY ON A SILVER PLATTER

(By Crosby S. Noyes)

It is now only too obvious why the Moscow summit meeting came off as scheduled. Considering what they are likely to achieve as a result of it, no

other problems, including the outcome of the war in Vietnam, are even approximately on the same magnitude of importance to the leaders of the Soviet Union.

It was of major importance, of course, to Richard Nixon as well. *The series of agreements*—the whole atmosphere of the Moscow meeting—was of very great value in an election year. The fact that most of the agreements were prepared months ahead of time and would have come into effect anyway is largely beside the point. The fact that it may take months for the American public to understand the price that was paid for a few hours of Kremlin cordiality is an essential part of the meeting's success.

The Russians played hardball in Moscow and they won. The crowning achievement of the meeting is said to have been an agreement on the limitation of offensive and defensive strategic nuclear arms. And it probably is the most disadvantageous agreement of its kind that the United States has ever entered into.

As most Americans had understood the strategic arms limitations talks that have been dragging on for nearly three years in Vienna and Helsinki, the objective was to work out an agreement that would freeze the nuclear arms race between the United States and the Soviet Union at a rough parity that would diminish both the danger of war and the cost of continuing unrestricted competition. As a concept, it was sound enough.

But the agreement reached in Moscow, in fact, does no such thing. On the contrary, it virtually assures the Soviet Union a very significant superiority in every important area of nuclear weaponry within the next five years. Far from being a freeze on anything, it permits the development of the Russian nuclear arsenal well beyond the capacity which most American experts believe they will be able to achieve.

To the extent that parity has been established in the SALT agreement, it applies only to defensive missiles, which the Russians from the outset were anxious to limit. Under the terms of the agreement, both sides, essentially, would remain vulnerable to the other. We would not have a credible defense against a first strike aimed at our land-based missile sites; the Russians would not be able to defend themselves against retaliation against their major cities.

But the apparent trade-off here is obviously not equal. Each side, under this formula, would be equally vulnerable to a first-strike nuclear attack against its offensive missile force and to a retaliatory blow to its cities. But since, under this formula, a nuclear first-strike could offer a strong probability of wiping out a very major part of the retaliatory force, the odds are clearly stacked in favor of the side that launches the first, all-out nuclear assault.

So it is in the area of offensive weapons that the Moscow agreement counts most. And in this area the Russians have won a very significant, if not decisive advantage, consecrated in a formal agreement between the two countries.

As administration spokesmen have been explaining the agreement, there is a kind of trade-off between quantity and quality in offensive weaponry between this country and the Soviet Union.

It is conceded that the Russians, under the provisions of the agreement, will be permitted to have more land-based missiles (at least 1,600) than we have (1,050). It also is conceded that if the Russians take advantage of all the options offered them, they also would have a substantial numerical advantage in submarine-launched missiles (about 950 to 700).

It is being argued, however, that because the United States has developed multiple warheads that can be independently targeted (MIRV), the Russian numerical superiority is offset. As of today, for instance, it is pointed out that we have 5,700 deliverable warheads on our existing missile as against 2,500 for the Soviet Union. Furthermore, we are being told, it is unlikely that the Russians will take advantage assumed by adminis-- offered to them under the SALT agreement.

Both arguments are highly suspect. The qualitative advantage assumed by administration spokesmen must be rated as temporary and highly misleading. There is nothing in the agreement that would prevent the Russians from developing multiple warheads of their own in the near future, and indeed it is almost a dead certainty that they will.

The qualitative argument, furthermore, cuts both ways. The largest Soviet warheads, MIRV-ed or not, are immensely more powerful than the largest American weapons. For example, the 313 SS-9 (or larger) weapons that the

Russians will be permitted under the agreement represent at least the equivalent in explosive power of 4,725 of the largest American weapons.

To assume that the Russians will not take advantage of the options offered them under the SALT agreements is incredible. For the last 10 years, they have maintained a staggering momentum (17 new submarines and 25 new missile sites presently under construction) in an effort to achieve nuclear superiority over the United States. They can surely be counted on to take every advantage of an agreement which, in effect, hands them that superiority on a silver platter.

[From the New York Times, June 2, 1972]

KREMLIN TERMS ACCORDS TRIUMPH—BREZHNEV IS REAPING PRAISE FOR TALKS WITH NIXON

(By Hedrick Smith, Special to The New York Times)

Moscow, June 1—The new Soviet-American agreements on strategic-arms limitation and other issues, formally approved today by leading Communist party and Government bodies, are being hailed here as triumphs of major significance, altering the world political climate.

The Communist party leader, Leonid I. Brezhnev, is reaping public praise for his week of talks with President Nixon. And some people, in letters published by the controlled press, are saying they expect the civilian sector to benefit from the savings realized through the arms-control measures.

Privately, however, highly placed Soviet sources have expressed disappointment that the Moscow talks did not yield a major breakthrough on trade.

Despite White House denials that trade concessions are being withheld pending progress on the Vietnam negotiations, the Soviet sources said they suspected that the impasse on trade was linked to Vietnam and reflected President Nixon's disappointment over his inability to get explicit Soviet promises of help in working out a settlement.

Such an approach, the Russians assert, overestimates Moscow's capacity to influence the North Vietnamese as well as the importance it attaches to increased trade.

Nonetheless, the Soviet leadership was reported to have been hopeful that the talks with Mr. Nixon and his aides would produce clear-cut American decisions on such central issues as the outstanding Soviet Lend-Lease debt, the granting of equal tariff treatment for Soviet imports and the approval of Government-backed credits for Soviet purchases—all requisites of expanded trade.

Moscow, which regards these more as political than as economic issues, had hoped to see them move forward in the high-level political talks, it was explained.

The importance that the Soviet leaders attach to trade prospects was underscored by Tass, the Soviet press agency, in reporting formal approval of the results of the American-Soviet meeting by the government 15-man Politburo of the Communist party, the Council of Ministers and the Presidium of the Supreme Soviet, or parliament.

Tass reported that the results had been "entirely approved," but it did not say the action was unanimous, as is customary for such events.

"The Soviet Union comes out for developing trade and broad economic relations with the United States, believing that reciprocally advantageous solutions can be found in this sphere too," the dispatch said.

In a passage designed to reassure allies as well as to project the prospects for long-term stability in Soviet-American relations, Tass quoted the ruling bodies as asserting that the joint declaration of principles signed Monday by Mr. Nixon and Mr. Brezhnev "creates the prerequisites under international law for building ties and cooperation in all fields of mutual interest, on a firm and long-term basis, by no means to the detriment of third countries."

The dispatch not only hailed the arms agreements as "the most important measure" to date for avoiding nuclear war and curbing the arms race but also emphasized the importance of American acceptance of "the principle of parity and equal security" between two countries.

A front-page commentary in Pravda yesterday went further, declaring that "the crowning success" of the Moscow talks and agreements would have "great significance in changing the political climate in the world for the better."

The wave of publicity has been coupled with almost equally enthusiastic reporting on the ratification of the west German treaties of nonaggression with the Soviet Union and Poland. The Supreme Soviet formally ratified the Moscow-Bonn treaty yesterday.

In a speech to the Supreme Soviet, an alternate member of the Politburo, Pyotr Y. Masherov, party leader in Byelorussia, paid tribute to Mr. Brezhnev for the success of the negotiations.

The Soviet party leader's enthusiastic support of accommodation with Washington attracted interest because of his reputation as a hard-liner on the basis of several tough articles and speeches last fall.

The discussion on the West German treaty included the first indication that Moscow had abandoned hopes of holding a European security conference this year.

Although the United States is getting generally more favorable coverage of its official policy in the Soviet press than in years, Tass has resumed coverage of the trial of Angela Davis, long a major news attraction that was ignored during Mr. Nixon's visit. Articles about the Vietnam war, given modest display and neutral headlines during the visit, seemed slightly more sharply worded.

In comparison with several months ago, the items are still receiving low-key treatment.

[From the Federal Times, June 7, 1972]

CASE BILL WOULD LIMIT EXECUTIVE PACTS TO BASES, NUCLEAR STORAGE

Washington.—Although the Nixon administration is opposed to congressional veto of executive pacts, a Republican senator wants to limit their use to those involving military bases and the storage of nuclear weapons.

Sen. Clifford P. Case, R-N.J., has introduced a bill to cut off funds needed to carry out these agreements unless the Senate approves them as treaties.

Sen. Case declared that he was "deeply pleased" by the State Department's decision not to oppose his older bill which merely requires the transmittal of executive agreements for congressional review.

That bill, S. 596, passed the Senate in February by an 81-0 vote. It requires executive agreements to be sent to Congress within 60 days of their enactment.

Case said that the State Department's guarded endorsement, on the eve of the President's trip to Moscow, "seems to me to be of great potential significance to the future relations between these two co-equal branches of government."

John Stevenson, legal adviser at the State Department, told Sen. Sam Ervin's subcommittee on separation of powers that the administration "will not oppose that bill (Case's) if Congress truly feels this is the wisest manner in which to proceed."

Earlier administration officials testified before Sen. Ervin's panel that they oppose an Ervin bill to require review of all executive agreements in 60 days, subject to veto by concurrent resolution.

Senator Case then introduced his new bill, S. 3637, focusing on executive agreements involving military bases and nuclear weapons. It would apply to agreements previously made.

The Ervin bill, S. 3475, "would put the United States at a disadvantage in international negotiations," Stevenson declared. "The ability to make firm agreements with immediate binding effect is frequently of critical importance in obtaining and formalizing concessions from other governments."

For good measure, Stevenson said he is opposed to another Case bill which demands that Congress must approve last year's agreements with Portugal for a military base in the Azores and for facilities at Bahrain.

"I do not believe the approach is based upon a sound constitutional premise, and I must regretfully state our opposition to that bill," the State Department official said.

Nicholas deB. Katzenbach, attorney general and deputy under secretary of State in the Johnson administration, testified that he could not support the Ervin bill in its present form.

"I think Congress is entitled to know, if it wishes, every formal obligation of the United States," Katzenbach said. "I think the discipline of having to submit such agreements would be healthy."

"I do not believe, however, that Congress can constitutionally qualify the power of the executive to enter into such agreements when they are within his own traditional constitutional prerogatives, at least not by concurrent resolution," he said.

Those types of resolutions, unlike bills passed by Congress, are not subject to a presidential veto.

Katzenbach said, "There is merit in not forcing every issue to a vote, and in allowing the President some latitude. Ordinarily he wants and needs that broad underlying consensus, knowing that our policy cannot be successful without it."

Opposition also came from the Pentagon's J. Fred Buzhardt, general counsel of the Defense Department. He declared that the Congress "is already intimately involved in the overwhelming majority" of executive agreements that are of interest to Defense.

The 60-day grace period given Congress to approve agreements under the Ervin bill "would constitute a severe impairment and, in some cases, would preclude the consummation of agreements which could otherwise be obtained to advance the interest of the United States," Buzhardt testified.

Moreover, under the supremacy clause in Article VI of the Constitution, "Congress has no authority by concurrent resolution to repeal or amend the laws of the United States or treaties made under the authority of the United States," he declared.

Ralph E. Erickson, assistant attorney general at the Justice Department, also spoke against the Ervin measure. It "presents substantial constitutional problems of its own," he noted. He said. "The very source of the President's powers suggests that determination of whether an international arrangement is to be effected by treaty or executive agreement should be resolved by the existing sound and traditional constitutional process."

The President has independent power under the Constitution to conclude executive agreements, Erickson said. This includes the power to "receive ambassadors," and thus to recognize foreign governments. Also, the President can make operational arrangements, such as cease-fire agreements to insure the safety of troops.

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